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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1092

STAR OFFICE SUPPLY COMPANY,
HENRY PINKWATER, et al.,
Petitioners,

—v—

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Appendix to Petition is Separately Bound]

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Star Office Supply Company, et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, described *infra.*

Opinions Below

The Court of Appeals did not render a written opinion. The opinion of the Federal Trade Commission, and the Initial Decision of the Hearing Examiner, are printed in the separate appendix volume filed herewith.

Jurisdiction

The judgment of the Court of Appeals was entered on September 28, 1971. By order of Mr. Justice Marshall the time for filing a petition for certiorari in this case has been extended until February 25, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), with which see also 15 U.S.C. § 45(g)(2) and 28 U.S.C. § 2101.

Question Presented

Petitioners, wholesale dealers in office stationery supplies, have been ordered by the Federal Trade Commission to cease and to desist from certain unfair and deceptive acts in obtaining and in filling orders from customers. The disapproved methods of obtaining orders consisted of deceptive "foot in the door" "pitches" to prospective customers, such as falsely representing that an officer or a friend of the customer had recommended approaching the customer, or that goods were available for sale owing to a forced closing of a business or other distress. The disapproved methods of filling orders consisted of sending the customers items which had not been ordered or larger quantities of ordered items. The question is:

Granting that the disapproved practices were proved to have been committed by jobbers or independent-contractor salesmen who marketed petitioners' goods, are the proofs sufficient—either as to the extent of such practices in petitioners' overall business activity, or as to responsibility (direct or vicarious) of petitioners—to justify the inclusion in the cease and desist order of paragraph 7 of said order, which requires advance written notification to purchasers in the nature of a complete pre-shipment invoice? Does this paragraph 7 pre-shipment invoice requirement bear a reasonable relationship to the violations, especially in view of the fact that this pre-shipment invoice requirement oppressively restricts petitioners' business and destructively impairs their ability to compete in this intensely competitive line of business?

Constitutional Provisions and Statute Involved

The case involves the Fifth Amendment due process and equal protection provisions. It also involves the following provisions of the Federal Trade Commission Act, §§ 5(a)(1) and 5(a)(6) (15 U.S.C. §§ 45(a)(1), 45(a)(6)):

> *Sec. 5(a)(1).* "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 66 Stat. 632, 15 U.S.C. § 45(a)(1).
>
> *Sec. 5(a)(6).* "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 66 Stat. 632, 15 U.S.C. § 45(a)(6).

Statement of the Case

This petition for certiorari seeks review of a judgment of the United States Court of Appeals for the Second Circuit, entered September 28, 1971, affirming and enforcing an order issued by the Federal Trade Commission against petitioners on April 16, 1970.

The proceedings before the Commission were commenced by complaint of the Commission in November 1967,* charging petitioners Star Office Supply Company, and Henry Pinkwater individually and as an officer of Star and trading as Pioneer Credit Company, with having engaged in unfair and deceptive acts and practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

---

* As the Court below expressed curiosity, at the oral argument, as to why this proceeding, commenced in 1967, has been so protracted, we here note that there were lengthy intermediate proceedings (now no longer relevant) involving the Commission's procedural policies as to "Jencks Act" disclosure.

After evidentiary hearings, the Hearing Examiner filed his Initial Decision finding that petitioners' jobber-salesmen, in soliciting orders for petitioners' merchandise, had used false "foot in the door" representations and had submitted to petitioners orders padded in excess of the quantities ordered by the purchasers. The Examiner also found that petitioners were responsible for these activities of the jobber-salesmen, even considering them as independent contractors, under the "apparent authority" principle of *Goodman* v. *Federal Trade Commission*, 244 F.2d 584, 590-591 (C.A. 9, 1957).

The Examiner's initial decision also noted, however, significant instances of steps taken by petitioners, *per* petitioner Pinkwater (the controlling figure in petitioners' business), to correct and to discipline offending jobber-salesmen, to facilitate return of unwanted merchandise by purchasers and refunds of overpayments, and in general to carry out a thorough house-cleaning of the offensive and improper practices of the jobber-salsemen.

There is no charge, and no evidence, in this case, of any price-padding or of any other kind of price cheating whatever. The case involves solely the "foot in door" and order-quantity-padding activities. Nor does the case involve any charges or evidence of quality misrepresentation or of any other kind of quality-degraded merchandising practices. The offending activities in this record consist of about 30 incidents out of about 40,000 sales over a five year period.

The Commission adopted the findings and decision of the Examiner in all respects here pertinent, and it adopted the order of the Examiner as its own. That order included the following "cease and desist" items which are pertinent to the issues of the within review proceedings:

> "6. Padding, increasing or overstating the quanttiy of merchandise ordered, through the use of confusing or misleading nomenclature or descriptions to denote

quantity, or through any other method or means; or failing accurately and precisely to record on order blanks or any other documents purporting to state an order for such products, the kind, quantity, quality and price of goods ordered.

7. Failing to furnish to purchasers, prior to shipment of such products, a written statement setting forth clearly and conspicuously, a full and accurate description of the quantity and the unit and total prices for each ordered item to be shipped and, where such have been the subject of representations or specifications in connection with the purchase order, the brand name, type, size or quality of the items ordered.

8. Substituting merchandise items, shipping in greater quantities or billing at higher prices than as set forth in the statement furnished the purchaser prior to shipment, except upon the express authorization of such purchaser.

9. Thwarting, refusing to accept, or preventing by any method or means, cancellation of all or part of any order for merchandise; provided, however, that it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that any such transaction did not involve an act or practice prohibited by other parts of this order."

In the petition for review in the Court of Appeals, and in petitioners' brief and argument in that Court, it was urged that (1) the findings as to responsibility of petitioners for the acts of the jobber-salesmen are not supported by the evidence, and (2) that the above quoted paragraph 7 of the order bears no reasonable relation to the violations and is oppressive. The Court of Appeals affirmed the order in all respects, from the bench, at the conclusion of the oral argument, without rendering a written opinion. One of the Judges of the Court of Appeals (Kaufman, *C.J.*) re-marked during the oral argument that, if paragraph 7 is unreasonable or oppressive, petitioners may pursue further administrative remedies before the Commission by a proceeding to reopen.

(It should be noted here that, since paragraph 7 of the order came into this case for the first time after the completion of the evidentiary proceedings before the Examiner, there was no opportunity in those evidentiary proceedings to present testimony on the question of the reasonableness or oppressivness of paragraph 7. The issue having been litigated in the Court below, we respectfully raise it here.)

Reasons for Granting the Writ

This petition for certiorari is addressed exclusively to the question of the constitutional and statutory reasonableness of the pre-shipment invoice requirement of paragraph 7 of the order as above quoted. This issue merits certiorari review because it is both important and unique.

The issue is unique, as there is no precedent for such a Federal Trade Commission order compelling advance written notification by sellers to purchasers.

The issue is important because of its obviously massive potential impact on the wholesale merchandising businesses of this country, and because of its individualized destructive impact on petitioners' constitutional right to survive competitively in their line of business.

As to the uniqueness of the issue of the reasonableness of paragraph 7 of the order, the Commission argued in its brief in the Court of Appeals that there is precedent for such a requirement, citing *S. & S. Pharmaceutical Co. v. Federal Trade Commission*, 408 F.2d 487, 489 (C.A. 5, 1969). The latter case is not in point, however, as it involved the entirely distinguishable situation of a really atrocious plan by a maker of diet pills to place ads in local newspapers throughout the country telling people to go to the local druggist for the pills, with a coupon-refund inducement for subsequent purchases from the druggists, the coupons to be mailed to the maker with the druggist's name, whereupon the maker, who had meanwhile shipped unsolicited batches of the pills to the druggists, would be able to bill the druggists for items sold by them as evidenced by the coupon returns. Naturally, this "height-of-nerve" selling device was subjected by the Federal Trade Commission to the discipline of an advance written notification procedure, and the Fifth Circuit approved. But even so, the Fifth Circuit noted that the parties had construed the advance confirmation procedure as applying only to an initial shipment to a particular druggist when accompanied by a written agreement for further continuation of the relationship with the maker of the diet pills.

Far different is our case, in this matter of the paragraph 7 requirement of pre-shipment invoices. No other wholesale stationery business in the United States, except the present petitioners, is subject to such a requirement by the Federal Trade Commission, so far as we know; nor, as far as we know, is any other business in this country subject to any such Federal Trade Commission requirement.

Before noting the oppressiveness of paragraph 7 in its impact on petitioners' chances of competitive survival, let us note the sheer lack of need for this oppressive requirement in the present case. We have above quoted, in addition to paragraph 7 of the order, paragraphs 6, 8, and 9 of the order, and these latter paragraphs of the order are manifestly a plenary set of cease-and-desist prohibitions against any conceivable kind of padding of shipments such as the Commission has decided to prevent in this case. That is, by paragraphs 6, 8, and 9 of the order, petitioners are already, without more, under an absolute and comprehensive ban against any such padding of shipment quantities. Were petitioners to violate paragraphs 6, 8, or 9, they would become instantly subject to punitive proceedings under the statute. What, then, is added by the pre-shipment invoice requirement of paragraph 7?

Literally all that is added by paragraph 7 is administrative supererogation, and unconstitutional oppression of petitioners. For, by reason of the sheer time-delay-cumbersomeness of this sort of pre-shipment invoice requirement, petitioners' business would be destroyed within a very short time as a matter of competitive survival. There is almost indescribable competition in the wholesale office stationery field in great metropolitan regions like the New York-East Coast region. Salesmen in this field depend for their success very largely on a relatively rapid and highly competitive negotiation with the purchasers, nearly always by telephone, and then followed by exceedingly prompt shipment of the merchandise so as to satisfy the customers' wants and to clinch the sale. To require a business like that of petitioners to undertake the slow-motion procedures of the pre-shipment invoice requirement of the within paragraph 7, is for all practical purposes to spell the death of that business for downright "logistical" reasons.

We are not saying, in this petition for certiorari, that our petitioners should be freed of what we may term the "substantive" cease-and-desist requirements of the above quoted paragraphs 6, 8, and 9 of the Commission's order. It is the unnecessary and oppressive "procedural" implementation of those requirements, through the additional and destructive impact of paragraph 7, to which we here object and against which we here urgently seek redress as a matter of our literal business survival.

Businesses like the present wholesale office stationery business, involving extraordinarily competitive wholesale and retail markets in which numerous small-to-medium-sized businesses vie for a conscientiously profitable share of the market, exist throughout the business economy of this country, dealing in every imaginable kind of merchandise. That something less than "Boy Scout" methods of competitive, that unsavory competitive "refinements", that the vernacularly termed "schlock" pressure methods of competitive selling, do form part of the *enterprise* energies in these fields of American business, is a truism. These branches of the American business environment have traditionally been the successful province of the "go-getter" type of salesmanship skills.

We ask, in all earnest and socially-concerned respectfulness, is it really imaginable to anyone that there will ever come a time in this country—so long as it remains this kind of country—when a business-ethics-monitoring agency like the Federal Trade Commission shall undertake a systematic and total monitoring of the peripheral niceties of these innumerable "schlock"-competition incidents throughout the day-to-day business life of this country?

It is enough that petitioners stand under the enforcement interdict of paragraphs 6, 8, and 9 of the Federal Trade Commission order herein. Unless our petitioners are to be thought recklessly determined to violate paragraphs 6, 8, and 9 and thereby promptly bring down upon themselves the irretrievable business ruin of punitive proceedings under the statute, they do not stand in further need of the impossible-to-live-with and administratively unnecessary paragraph 7 of the order.

As an example of the wise and proper perspective which Courts ought to take in cases of this type, we respectfully refer the Court to the sophisticated decision of the Second Circuit in *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (C.A. 2, 1970), where it was recognized that, for the purposes of the Federal mail fraud statute, there is not any ultimate or uncompromisable federal public value in puritanically monitoring the competitive ardors of the wholesale office stationery businesses of this country.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Jacob P. Lefkowitz
Abraham Glasser
Attorneys for Petitioners

Supreme Court, U.S.
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IN THE

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—v—

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Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Final Order

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 8749

COMMISSIONERS:

Caspar W. Weinberger, *Chairman*
Paul Rand Dixon
Philip Elman
Everette MacIntyre
Mary Gardiner Jones

In the Matter
of

STAR OFFICE SUPPLY CO., a corporation, and HENRY PINKWATER, individually and as an officer of said corporation and doing business as PIONEER CREDIT CO., and, with other individuals, doing business under various fictitious trade names.

This matter having been submitted to the Commission on the cross-appeals of complaint counsel and respondents from the hearing examiner's Initial Decision filed April 11, 1969, holding that respondents had violated Section 5 of the Federal Trade Commission Act as charged in the Complaint; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record, and having determined that, for the reasons discussed in its Opinion, the Findings of the hearing examiner should be modified in part, and that the Order of the hearing examiner should be adopted as the Order of the Commission;

IT IS ORDERED that the appeal of respondents be, and it hereby is, denied; and that the appeal of complaint counsel be, and it hereby is, granted.

IT IS FURTHER ORDERED that the Initial Decision as modified by the Opinion of the Commission which accompanies this Order be, and it hereby is, adopted as the Decision of the Commission.

IT IS FURTHER ORDERED that respondents Star Office Supply Co. and Henry Pinkwater shall, within sixty (60) days after service of this Order upon them, file a written report with the Commission, signed by said respondents, setting forth in detail the manner and form of their compliance with the Order to Cease and Desist hereby adopted by the Commission.

IT IS FURTHER ORDERED that respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising under this Order.

Commissioner Elman filed a separate statement.

The Opinion of the Commission and the separate statement of Commissioner Elman accompany this Order.

Chairman Weinberger did not participate.

By the Commission.

/s/ JOSEPH W. SHEA
JOSEPH W. SHEA,
Secretary.

SEAL

ISSUED: April 16, 1970

Opinion of the Commission

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 8749

COMMISSIONERS:

Caspar W. Weinberger, *Chairman*
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In the Matter of

STAR OFFICE SUPPLY CO., a corporation, and HENRY PINKWATER, individually and as an officer of said corporation and doing business as PIONEER CREDIT CO., and, with other individuals, doing business under various fictitious trade names.

By Jones, *Commissioner*:

This matter is before the Commission on the cross-appeals of respondents and complaint counsel from the initial decision of the hearing examiner which found that respondents Star Office Supply Company and Henry Pinkwater, its president, had engaged in various unfair and deceptive acts in the sale of office supplies and related items in violation of Section 5 of the Federal Trade Commission Act.

Respondents' appeal challenges the sufficiency of the evidence supporting the hearing examiner's substantive findings of liability and the propriety of one of the provisions of the order which he proposed be entered against them.

Opinion of the Commission

Complaint counsel's appeal challenges the correctness of the examiner's rulings bearing on the producibility of certain memoranda prepared by counsel of interviews conducted of several of the witnesses called by complaint counsel.

I

We have examined all of the evidence in the record and the examiner's findings relating to respondents' liability. We are convinced that the examiner did not err in his conclusions that the alleged misrepresentations and deceptions took place and that respondents are in fact responsible and liable for them.

Respondents' major defense against these complaint allegations is their contention that they were not responsible for the actions of their salesmen, that they cancelled inflated orders when their attention was drawn to them and that they did not benefit but indeed suffered financial loss from the misrepresentation of these jobber-salesmen when they were forced to cancel the orders. (RB pp. 10-13.)[1]

The evidence is clear that respondents' jobber-salesmen were recruited and hired by respondent for the specific purpose of soliciting orders for respondents' products. Respondents compensated these salesmen on the basis of commissions geared to the total sales made by them, and supplied many of them with office space, telephone service and clerical services. There is evidence in the record that respondents were also involved in and knew of the sales pitches which were used by these jobber-salesmen, as well as of the techniques used by them in order to gain access to the customer. The evidence also supports the fact that respondent Pinkwater owned the trade names of the companies in whose names most of these jobber-salesmen were directed by respondents to solicit the orders. Orders addressed to these companies were received and filled by respondents. All of the merchandise ordered was shipped to the jobber's customer directly by respondents (i.e., none of the jobbers carried their own inventory—all transactions were handled on a drop-shipment basis), and in all but rare instances payment was received at respondents' place of business and was banked by respondents rather than by the jobber. Respondents admit in their brief that their policy was to require their jobber-salesmen to make adjustments where their customers were dissatisfied and to make these adjustments themselves on their jobbers' accounts where the latter refused to do so (RB p. 11). When customer complaints were received or customers did not pay, respondents undertook to adjust the complaints to their own best advantage, using the name of an admittedly fictitious collection agency in some instances.

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[1] As used herein RB refers to respondents' brief, I.D. to the hearing examiner's initial decision, Tr. to the transcript, RX to respondents' exhibit, CX to complaint counsel's exhibit.

In addition to respondents' direct involvement in their jobber-salesmen's solicitations on their behalf, the evidence also demonstrated that respondents were fully aware of the misrepresentations made by their salesmen in soliciting these orders. It is clear from Mr. Pinkwater's testimony that he saw nothing deceptive or unfair in employing fictitious companies for the solicitation of orders, in seeking to persuade customers to keep the larger order even though it hadn't been ordered, in keeping on jobber-salesmen whom he knew were engaging in fake door-openers and inflating orders for at least as long as was required for Star to recuperate some of the money owed him by these jobber-salesmen as a result of order cancellations (Tr. 333, 336, 361). Nor did he see anything unfair or deceptive in continuing efforts to collect accounts from customers to whom merchandise had been sent who had advised respondents that they hadn't ordered it and didn't want it, in sending such customers letters threatening suit in the event of non-payment or in sending them a letter from a fictitious collection credit company in order to have the customers believe that they would be reported to a credit reporting company unless they paid (I.D. pp. 62-66).

The hearing examiner found that the "Jobbers are not employees of Star. They are independent and self-employed" (I.D. p. 68). He concluded that the tehnical form of respondents' relationships with their jobber-salesmen was not determinant of their liability for their salesmen's acts under Section 5 of the Federal Trade Commission Act and held that on the law and the facts, respondents were responsible and liable for the acts of their jobber-salesmen. We agree.

There is no doubt that respondents were deeply involved in their jobbers' business transactions. Respondents sought to benefit from the wrongful acts of the jobbers, fully knowing the nature, purpose and result of those acts. By supplying the financial backing, the inventory, the physical facilities, the clerical services, shipping—in fact all elements of the scheme except actually taking the customers' orders—the respondents materially and substantially contributed to, and participated in, the salesmen's activities for their own benefit.

We find that the hearing examiner's findings and conclusions on respondents' liability were fully supported by the evidence and that respondents' denial of liability for the deceptive acts of their jobbers is wholly without merit. *Globe Readers Service, Inc.* v. *FTC*, 285 F.2d 692, 695 (7th Cir. 1961).

We hold that respondents' other contentions with respect to the order are equally without merit. Respondents argued that the seventh paragraph of the examiner's order bore "no reasonable relation to the unlawful acts charged and unreasonably restricts respondents' business" (R.B. at 13). We disagree.

The Order paragraph in question is aimed directly at the order-padding allegations of the complaint which the examiner found fully sustained by the evidence. The evidence indicated a consistent pattern of order-padding by respondents' salesman. It also indicated that respondents knew of this practice and nevertheless shipped these orders as written by the salesmen to customers together with a packing list indicating the items shipped but showing neither the unit or total price, nor the actual contents of the various units ordered. Thus respondents' customers had no way of spotting the order discrepancies until the ordered packages were partially used or the customer received his bill.[1]

To eliminate this type of deceptive selling practice, paragraph 7 of the order requires respondents to submit to its customers in advance of shipment a fully detailed invoice setting forth the type, quantity and price of the merchandise items ordered. We agree with the examiner that this provision is essential to prevent deception of this type from occurring in the future. We do not agree with respondents' contentions that the provision is not warranted by the evidence or that it will place respondents at a competitive disadvantage. The requirement of fairness and honesty in dealing with customers does not cause competitive disadvantages. Indeed precisely the reverse is the case.

It is obvious that only by such a requirement can the deceptions perpetrated here be eliminated. Such a requirement will ensure that prior to shipment of the merchandise, the customer receives adequate notice of what will be shipped, thereby affording him an opportunity to notify respondents of any variations between his order and what he will ultimately receive. Therefore, this order provision is directly related to a deceptive practice which was not only charged in the Complaint, but which was proved by both documentary and testimonial evidence, including respondent Pinkwater's own admissions.[1]

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[1] Typically, the customer might order 12 cartons of carbon paper at $3.00 per hundred sheets. When the shipment arrived the correct number of cartons would be shown on the packing list and no question would then arise. When later invoiced however, the customer would be charged for 3,000 sheets at $3.00 per hundred for a total of $90.00 rather than the expected 1,200 sheets at the expected total of $36.00. Prices were quoted per hundred sheets, but sold by the carton; customers were not told that the cartons contained 2½ times the quantity they believed they would receive. This method of overshipping is related by many customer witnesses whose testimony is summarized by the hearing examiner (I.D. at 24-61), and it is confirmed by respondent Pinkwater's own testimony (Tr. 354-355, 359).

In all other respects we find the order proposed by the examiner to be necessary and wholly warranted by the facts and the necessity to dissipate the illegalities found here.

II

The Producibility of Counsel's Memoranda Respecting Interviews of Witnesses

In view of our decision on the merits, the issues raised by complaint counsel in his appeal have been rendered largely moot. Nevertheless, because of the importance to future Commission proceedings of the producibility issue raised by counsel, we believe it is necessary to deal with the issue briefly.

Complaint counsel put seven witnesses on the stand who had been previously interviewed by Commission staff and for whom memoranda had been prepared respecting these interviews. In two instances, counsel's notes which had formed the basis for the memoranda were still extant and legible. In the remaining five instances, the notes were illegible.

The examiner directed complaint counsel to turn over the notes of the interviews when they were legible. When they were illegible, he directed counsel to turn over the interview memoranda. It is the latter direction—relating to the portions of the five interview memoranda directed to be turned over—with which complaint counsel refused to comply.[1] As a result of this refusal, the examiner stated that in reaching his decision in the case he would not consider the testimony of the five witnesses affected by counsel's refusal.[2] It is this action by the examiner which complaint counsel puts in issue on his appeal.

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[1] Pinkwater not only admitted that he knew that the jobbers were padding their orders, the attempted to eliminate the practice (see RX 33 quoted at I.D. 72; Tr. 354-355).

In essence the issue before us as a result of the examiner's rulings on these notes and memoranda is whether the examiner erred in the standards he applied in reaching his conclusion as to the substantially verbatim nature of the material contained in the memoranda and notwithstanding this, whether in fact these memoranda did contain substantially verbatim statements of the witnesses which would require their production in whole or in part to respondents.

---

[1] The hearing examiner entered this ruling first with respect to two witnesses called by complaint counsel for whom interview memoranda had been prepared. Tr. 745-746, 790. Complaint counsel filed an interlocutory appeal with the Commission from the examiner's first rulings striking the testimony of these two witnesses. The Commission ruled that the testimony was improperly stricken and directed the hearing examiner to make a proper determination of whether the interview reports constituted *substantially verbatim* statements within the meaning of the Commission's decision in *Inter-State Builders, Inc.*, Docket No. 8624 (April 22, 1966) (*Star* Interlocutory Opinion at 2-3 (September 18, 1968)).

[2] I.D. at 24. The examiner refused to grant the motion by respondents' counsel to strike these witnesses' direct testimony (Tr. 864, 899-900, 961, 1034, 1073) and instead directed that the interview report and the notes of complaint counsel be received *in camera* for use on review (*Id.*). He directed respondents' counsel to cross-examine these subsequent witnesses without the benefit of the memoranda or the notes (*e.g.*, Tr. 860-861). At one point respondents' counsel argued that he should be allowed at least to see the notes (Tr. 864), albeit the examiner could not make anything of them (Tr. 865). The hearing examiner regarded the notes as being controlled by the same considerations applicable to the interview report. When asked by the examiner if he would voluntarily furnish respondents' counsel with the notes, complaint counsel replied, "No, your Honor" (Tr. 864).

On the first issue, we hold that the examiner was in error in concluding that that so long as the witness was the *source* of the material contained in the memorandum and agreed that the material corresponded to what he recalled he had told the interviewer or that the information given during the interview and on direct examination was the same, that the notes, or failing these, the memorandum should be produced as constituting a substantially verbatim statement of the witness.[1]

On the second issue, our examination of the memoranda themselves in the light of the evidence adduced during the voir dire leads us to the conclusion that the examiner was in error in his conclusion that these memoranda contained substantially verbatim statements of the witnesses and consequently in his decision to turn some parts of these memoranda over to respondents' counsel.

The examiner based his conclusions respecting the producibility of these notes and memoranda both on his examination of the memoranda themselves and on the voir dire which he conducted of both witness and complaint counsel. His voir dire inquiry revealed, inter alia, that with respect to each witness interviewed, counsel had made notes either during or immediately after each of the interviews.[1] It was further testified that the memoranda relating to these interviews had not been dictated until some time—in some instances months—after the interviews had taken place and that the information contained in the memoranda had been based not only upon counse's notes of the interviews of the witnesses but also on material contained in exhibits furnished by the witnesses during the interviews and on counsel's recollections of the interviews at the time the memoranda were prepared.[2] Four of the witnesses agreed that the portions of the report or notes showed to them by the examiner corresponded to and accurately reflected what they recalled having told complaint counsel during the interview.[3]

---

[1] All 7 of the witnesses were asked by the examiner whether the statements given during the interviews and in their direct testimony were the same in substance or in effect. All but witness Martin gave affirmative responses; Martin's answer was unresponsive to the question. Only 4 of these witnesses were shown portions of the reports by the examiner. When asked, all of them indicated that the report contained the substance of their words given during the interview. (See Tr. pp. 889, 891, 908-909, 948-950, 978-979.)

In reaching his conclusions as to the producibility of these reports and notes, the examiner was apparently of the view that so long as the memorandum was based on the interview of the witness and documents furnished by him, the witness was the source of the information (e.g., Tr. 959). The examiner was also at least partially influenced in reaching his conclusion as to producibility by his belief that the weight of the evidence suggested that counsel *had* taken notes during the interview and that on the basis of this fact alone the notes or, where they were unavailable, the memoranda based upon them were producible as a witness' statement.[1]

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[1] Of the seven Boston witnesses, only one (Russell) stated flatly that he recalled notes being taken during the interview; another witness (Kaufman) thought it probable; one (Rochon) stated that no notes were taken during the interview; witness Avratin was not asked, and the other three witnesses (Kroll, Quill and Martin) could not recall whether notes had been taken or not. Commissioner attorneys McNally and Dinardi could not state from their then present recollections whether their notes had been made during or immediately after any of the interviews, but there was no dispute that it was either one or the other.

[2] Tr. 852-858, 898--899, 921, 956-960, 1027-1028, 1067.

[3] For witness Rochon see Tr. pp. 889, 891; for witness Kroll see Tr. pp. 908-909; for witness Kaufman see Tr. pp. 948-950; for witness Quill see Tr. pp. 978-979.

We disagree. It does not seem to us to be determinative of the issue here whether the witness in a general sense could be said to have been the source of the information contained in the memorandum. What is determinative in our judgment is whether the statements in the notes or in any other piece of paper prepared by counsel with regard to the interviews are those of the witness or are merely the interviewer's summary or version of what the witness said.

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[1] The examiner held that where the interviewer's notes formed at least a partial basis for the preparation of the finished memoranda, and were readable they—and not the final memoranda—should be considered to be the "statements" which under the Jencks Rule were to be handed over (Tr. 922-923). Where the notes proved valueless, the memoranda themselves should be produced and turned over to respondents' counsel. The examiner in explaining this ruling stated:

> "* * * as I stated, I would say that * * * in view of these circumstances, the field report would not be a statement within the meaning of the Jencks Act, *in view of the fact that the notes are available and readable*. Whereas, in the other instance we spoke about this morning, you couldn't decipher them * * *; and for that reason, I indicated that you'd have to take the formal field report as a statement within the meaning of the Jencks Act." (Emphasis added.)

The examiner drew this distinction because of his interpretation of the Commission's decision on the interlocutory appeal which he believed had held that the interview memoranda were not substantially verbatim statements (Tr. 863, 866). This is a misconception of the Commission's opinion on the interlocutory appeal. Contrary to the hearing examiner's view (Tr. 863, 866, 960-961), in our Interlocutory Opinion we did not decide that the Kroll and Rochon interview reports were not substantially verbatim statements. We held only that the record was insufficient to enable us to conclude whether the examiner's rulings were based upon the proper application of Jencks Act standards (Interlocutory Opinion at 4). It is clear from our instructions on remand that whether the reports were to be given to respondents' counsel was a question to be determined by the examiner—with respect to the Kroll and Rochon reports as well as other witnesses subsequently called (*Id.*).

Moreover, we believe the examiner also erred in showing the attorney's memoranda to the witnesses and then asking them whether the writing was a substantially verbatim reflection of what they had told the interviewer (see n. 3, p. 9, *supra*, and accompanying text). Since the purpose of making substantially verbatim statements of the witness available to respondents' counsel is to enable counsel to test the witness' present recollection of past events, making the availability of that statement turn on the witness' present recollection of another past event—the prior interview—in a sense forecloses the very issue which gives rise to respondents' request for production. By attempting in this manner to establish whether or not an interview report was a substantially verbatim statement of the witness, the hearing examiner made the question of producibility turn on the response of the very witness whose credibility was in issue, thereby foreclosing the possibility of the report's being used as an effective tool in the cross-examination process. Obviously, if the witness is shown an interview report which contains a prior statement which is inconsistent with his just-concluded direct testimony, the witness can keep the interview report out of the hands of opposing counsel— and thus preserve the credibility of his direct testimony—merely by telling the examiner that the interview report does *not* contain his prior statement in substantially verbatim form. The practice which the examiner here utilized was expressly disapproved by the Supreme Court in its opinion in *Campbell v. United States*, 365 U.S. 85 (1961). In that case the trial judge, in response to a defense request under the Jencks Act for production of an FBI agent's interview report, had used exactly the same technique of showing the interviewer's report to the witness and asking him whether it accurately reflected what he had told the agent.[1] The Supreme Court held this to be error:

> "*Reliance upon the testimony of the witness based on his inspection of the controverted document must be improper in almost any circumstances.* The very question being determined was whether the defense should have the document for use in cross-examining the witness. . . . [*He*] *should not have been allowed to inspect the Interview Report,* since there necessarily inhered in the witness' inspection of the paper the obvious hazard that his self-interest might defeat the statutory design of requiring the Government to produce papers which are 'statements' within the statute." (365 U.S. at 97, emphasis added.)

However, irrespective of these errors in the examiner's handling of the voir dire and his reasoning in reaching his conclusion with respect to the producibility of these memoranda, the question remains as to whether his conclusion was nevertheless correct in that the memoranda constituted substantially verbatim statements by the witnesses. Our examination of the memoranda and of the record of the examiner's voir dire leads us to conclude that the examiner's decision was in error. The five memoranda of counsel's interviews of the witnesses are essentially similar in format and contents. Each was prepared by the same counsel some period of time after the actual interview had been conducted on the basis of counsel's notes of the interview, documents furnished counsel during the course of the interview and his recollection of the interview. Each of the memoranda contain an opening paragraph or paragraphs summarizing the circumstances of the interview. The portions of each memorandum ordered turned over to respondents usually excluded these introductory paragraphs and embraced the bulk of the memorandum which followed a statement in the memorandum to the effect that the material which followed was based on what informant stated.[1] An examination of each of these interview memoranda makes it abundantly clear that they represent the interviewer's synthesis, selection and organization of the facts told him by the witnesses. The memoranda are carefully organized. They contain in most instances no indication of counsel's questions which must have elicited the facts recited. It is obvious that these memoranda consist almost entirely of the words of the interviewer. Quotation marks—while not necessarily a conclusive factor—were hardly used in these memoranda. The vocabulary used in each report is substantially identical and in no sense seems to reflect even an attempt to catch the flavor of the witness' words or form of expression. A reading of these memoranda clearly reveals an intermixture of paragraphs describing facts given by the witness to the interviewer with other paragraphs describing file searches and examinations of documents made by the witness during the course of the interview and also listing and summarizing documents furnished counsel by the witness. These memoranda are clearly not interview reports of witnesses' statements.[1]

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[1] In the *Campbell* case, the interview report had been prepared by an FBI agent on the basis of the notes which he had made during the interview and which had been approved by the witness. The notes, however, had been routinely destroyed by the agent after he had dictated his interview report from them.

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[1] The introductory words were variously phrased as "informant stated substantially as follows" (Russell memorandum), "burden of informant's statements and response is as follows" (Rochon, Kaufman memoranda), "his responses to the writer's queries . . . were substantially as follows" (O'Connor, Avratin memoranda).

The fundamental and underlying issue involved in the question of whether attorneys' memoranda reflecting interviews with witnesses are to be turned over was succinctly expressed by the Supreme Court. The touchstone of the Supreme Court's concern is possible unfairness to witnesses and potential distortion of the truth-seeking process. As the Court pointed out in its landmark decision on this point in *Palermo* v. *United States,* 360 U.S. 343, 350 (1959):

> "Not only was it strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest, but *it was felt to be grossly unfair to allow the defense to use a statement to impeach a witness which could not fairly be said to be the witness' own* rather than the product of the investigator's selections, interpretations and interpolations." (Emphasis added.)

Stressing its coequal concern with the possible distortion which can flow from turning over what are not in fact statements made by witnesses but only an attorney's version of them, the Supreme Court in its *Palermo* decision said (360 U.S. at 352-353):

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[1] This conclusion is further supported by the instances revealed in the transcript of variances between the "statements" in the memoranda ascribed by the examiner to the witness which in fact came from a document furnished by the witness (e.g., Tr. 852-858, 952, CX 540B, CX 358). Moreover, the examiner's statements that production was ordered in part on the basis of the witnesses' affirmative testimony that the statements in the report accurately reflected what they had told the interviewer—even if a proper voir dire technique—cannot, in effect, support the examiner's conclusion since in each instance the witness was shown only a small portion of the total memorandum (e.g., witness Rochon was shown two paragraphs of a six page report; witness Kaufman an 11 line paragarph out of a 4½ page report).

> "It was important that the statement could fairly be deemed to reflect fully and without distortion what had been said to the government agent. Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions. It is clear from the continuous congressional emphasis on 'substantially verbatim recital,' and 'continuous, narrative statements made by the witness recorded verbatim, or nearly so * * *,' see Appendix B, *post,* p. 358, that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital. Quoting out of context is one of the most frequent and powerful modes of misquotation. We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions."

Certainly the possibility of unfairness and distortion is as important a consideration in administrative proceedings as it is in criminal trials. In our opinions in *L. G. Balfour Company, et al.,* Docket 8435 (April 22, 1966), and *Inter-State Builders, Inc., et al.,* Docket 8624 (April 22, 1966), we adverted to some of the principal difficulties which can ensue for a witness—and ultimately then for the truth which the hearing seeks to elicit—if a witness is confronted on cross-examination with a memorandum which represents the attorney's summary of earlier statements made by him to the attorney. As we said in *Inter-State Builders, Inc., supra,* Trade Regulation Reporter, 1965-1967 Transfer Binder ¶ 17,532 at p. 22,800:

> "Confronted with an attorney's summary purporting to reflect his remarks, the witness might be caused to retract or change his statement because of what he feels may have been a prior inconsistent statement by him. If the prior statement was in fact made by him no unfairness could result; but if the prior statement was an incorrect interpretation of his remarks, he might well be influenced to defer to the views of the examining attorney and modify his remarks to the obvious detriment of truth rather than to its advancement, which is the purpose of all fact-finding and discovery."

It is clear that under the law, it would be a breach of the essential principles of fairness to permit a witness to be cross-examined on the basis of statements purportedly made by him to the attorney when in fact the "statements" are not those of the witness but only the attorney's summary of what the witness told the attorney. The issue then on this aspect of the appeal before us involves a single question: Is the "statement" in question which is contained in the memorandum the witness' statement or the attorney's synthesis of what the witness said? If the latter, regardless of how accurate a summary it may be, it is not producible—not because of its accuracy or inaccuracy but because it is the attorney's statement and not the witness'.

Our examination of the five memoranda in issue in this case has led us to conclude that these memoranda contain the attorney's summary of the facts as they were told to him by the witnesses and do not purport to memorialize the witnesses' statements which were made to these attorneys. For all of the reasons pointed out earlier, we are convinced that the five memoranda in issue in this proceeding are clearly statements by the attorney. As such, the portions of these memoranda which the examiner ordered turned over do not constitute statements *by the witness* recorded by the attorney and are therefore not producible to the respondents. The examiner was in error on this point.

In view of the discussion of the "Jencks" aspect of this case we find that the hearing examiner's rulings with respect to the interview reports of the Commission's Boston witnesses were in error not only because of the improper procedures followed and the insufficient bases upon which those rulings were predicated, but also because of our own examination of the *in camera* exhibits which leads us to the conclusion that they are not "a substantially verbatim recital of an oral statement . . . made contemporaneously with the making of such oral statement."[1]

An Order accompanies this Opinion.

Commissioner Elman filed a separate statement.

Chairman Weinberger did not participate.

April 16, 1970.

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[1] 18 U.S.C. § 3500(e).

Separate Statement of Commissioner Elman

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 8749

COMMISSIONERS:

Caspar W. Weinberger, Chairman
Paul Rand Dixon
Philip Elman
Everette MacIntyre
Mary Gardiner Jones

In the Matter

of

STAR OFFICE SUPPLY CO., a corporation, and HENRY PINKWATER, individually and as an officer of said corporation and doing business as PIONEER CREDIT CO., and, with other individuals, doing business under various fictitious trade names.

As the Commission recognizes, the *Jencks* issues raised by complaint counsel's appeal are now moot. Nevertheless, the Commission devotes most of its opinion to a discussion of these issues because of their "importance to future Commission proceedings". It is precisely because of their importance that I would defer consideration of these questions to a later case where (a) Chairman Weinberger will participate, and (b) unlike this case, there will be opportunity for judicial review. The Commission's practice under the *Jencks* rule has been sharply, and in my opinion justifiably, criticized by the bar and legal scholars. See, e.g., Gellhorn, *The Treatment of Confidential Information by the FTC: The Hearing,* 116 Univ. of Pa. L. Rev. 401, 428-433 (1968).

Separate Statement of Commissioner Elman

The FTC practice has been characterized as both unfair to respondents, in denying them access to concededly accurate interview reports which might prove useful on cross-examination, and as perpetuating inefficient and unreliable methods of taking witnesses' statements. In the circumstances, I think we would be well advised to defer further consideration of *Jencks* problems until they can be dealt with by the full Commission, and be subject to meaningful review by the courts.

April 16, 1970

Initial Decision

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
Docket No. 8749

In the Matter
of

STAR OFFICE SUPPLY CO., a corporation, and HENRY PINKWATER, individually and as an officer of said corporation and doing business as PIONEER CREDIT CO., and, with other individuals, doing business under various fictitious trade names.

By Walter R. Johnson, Hearing Examiner.

John J. McNally and Thomas J. Oden,
for the Commission.

Jacob P. Lefkowitz, New York, N. Y.,
Attorney for Respondents.

Arthur W. Jaspan,
Of Counsel.

In the complaint issued on November 27, 1967, the respondents are charged with unfair, false, misleading and deceptive practices in connection with the sale of their products, in violation of Section 5 of the Federal Trade Commission Act. Respondents in their answer, filed on December 26, 1967, in effect deny the material allegations of the complaint and allege that all persons engaged by the corporate respondent are independent contractors who are not under the control of the respondents.

On January 30, 1968, counsel for the parties met with the Hearing Examiner in a reported, but not public, prehearing conference and, as a result thereof, an agreed order was issued requiring, among other things, that pretrial briefs be filed on or before March 5, 1968, by complaint counsel, and by respondents on or before April 9, 1968. Trial briefs were filed accordingly. At a non-public conference held on April 16, 1968, the subject of time and place of hearings, among other matters, was discussed, and complaint counsel asked that hearings be scheduled in New York City, New York, Boston, Massachusetts, Baltimore, Maryland, and Los Angeles, California. In their trial brief, they listed the names of 30 witnesses to testify in New York City, 11 in Boston, six in Baltimore, and 11 in Los Angeles. Counsel for respondents agreed to put in their defense in New York City, except for such West Coast witnesses as they might call in Los Angeles immediately after complaint counsel rested their case in that City. On the basis of the showing made by complaint counsel on the record, the Hearing Examiner authorized hearings to be held in the above-named Cities, with the exception of Baltimore, and issued an order fixing the time thereof, which was agre[illegible]le to the parties.

Hearings began in New York City on May 6, and concluded on May 16, 1968, at which time 27 witnesses, called by complaint counsel, testified. On May 21, 1968, hearings were held at Boston, at which time two Commission witnesses appeared. At the conclusion of the direct examination of the first witness, Mr. Walter J. Kroll, respondents' counsel requested any pre-trial statements made by the witness (Tr. 735). Complaint Counsel McNally made a statement covering six pages of the transcript (Tr. 736-742), in which he concluded (Tr. 742): "We do not believe it would be proper to turn these over to opposing counsel for cross-examination, and I was authorized by Washington to state that that was our official position on the question." The Hearing Examiner was handed a five-page field interview report, dated 10-15-65, signed by Mr.

David W. Dinardi, an attorney for the Commission in its Boston office, recording statements made by the witness. After carefully examining the report, the Hearing Examiner came to the conclusion that, with the exception of two paragraphs thereof, it represented a statement of the witness of the matters covered on direct examination which should be turned over to respondents' counsel for use in connection with cross-examination. Complaint counsel refused to turn over the report to opposing counsel and a motion of the latter to strike the testimony of the witness was granted (Tr. 746).

After receiving testimony on direct examination of the second witness, Mr. Arthur C. Rochon, the same chain of events occurred as have been related with reference to the first witness. Respondents' counsel requested any pre-trial statement given by the witness. The Hearing Examiner was given a six-page, single-spaced field report of an interview of the witness, which took place on 8-4-65, signed by Complaint Counsel John J. McNally, bearing the date 11-1-65 (CX 539 A-F, *in camera*; Tr. 785). After looking over the report, the Hearing Examiner came to the conclusion that the report, with the exception of the first two paragraphs thereof, related to matters on which the witness gave testimony. In fact, the report contains more details of the transactions involved than the summary of the events related by the witness on the witness stand. Complaint Counsel McNally recognized this when he submitted the report to the Hearing Examiner by stating (Tr. 785): "This interview report contains additional material other than that which the man testified to, * * *." The witness stated that he was interviewed by Mr. McNally and the matters that he related to him were those to which he testified (Tr. 787). The following exchange took place (Tr. 788):

> "Hearing Examiner Johnson: You attempted to make an accurate report of the interview?

> "Mr. McNally: Yes, sir. Of course I am not a professional investigator.
>
> "Hearing Examiner Johnson: But you are a lawyer, are you not?
>
> "Mr. McNally: I am a lawyer."

The Hearing Examiner directed that the report, with the first two paragraphs blocked out, be turned over to respondents' counsel for their examination, which complaint counsel declined to do (Tr. 789), whereupon a motion of respondents' counsel to strike the witness' testimony was granted. At the request of Complaint Counsel McNally, a one hour recess was taken to permit him to "call Washington during the recess to see if they wish me to persist in this course in view of your ruling thereon" (Tr. 796). On resumption of the hearing, Mr. McNally said (Tr. 801):

> "I spoke to my superiors in Washington, and I summarized as best I could the issue and the posture of this case. My superiors concur in my recommendation that we persist in the approach we have taken, * * *."

Being informed by complaint counsel that all of the remaining Boston witnesses and all except one of the Los Angeles witnesses had given statements, and that they would refuse to submit to opposing counsel any of such statements until the issue was resolved by the Commission, the Hearing Examiner cancelled all scheduled hearings, to be reset on ten days' notice.

On May 27, 1968, complaint counsel filed with the Commission a request for permission to file an interlocutory appeal, which was granted by the Commission on June 28, 1968, Commissioner Elman dissenting. The appeal was submitted by complaint counsel on July 8, 1968, and respondents' answer thereto was filed on July 18, 1968. In an order ruling on the interlocutory appeal, dated September 18, 1968, and mailed September 25, 1968, it was directed that the Examiner's rulings on May 21, 1968, striking the testimony of witnesses Kroll and Roehon, be vacated, and that the Hearing Examiner continue this proceeding in accordance with the views expressed in the Commission's accompanying opinion. Commissioner Elman dissented and filed a statement. In the opinion, it is stated in part (pp. 2-3):

> "The examiner seemed to wholly ignore the prior rulings of the Commission on the subject of production of pretrial interview reports with witnesses. He indicates the view that interview reports generally should be produced by complaint counsel. While he queried the investigators who had conducted the interviews on the issue of whether or not they attempted to accurately report what the witness had said, he made no attempt, so far as the record discloses, to determine whether these reports contained the witnesses' own statements as defined by the applicable law. His holding, rather, seemed to be on the general ground of his determination that production was necessary in 'fairness' to respondent and his conclusion that the reports contain no confidential material.[2]
>
> "The Commission has set down detailed instructions on the question of the production of interview reports in such prior cases as *Inter-State Builders, Inc.*, Docket No. 8624 (order issued April 22, 1966), and *L. G. Balfour Company*, Docket No. 8435 (order issued April 22, 1966). These cases hold that inter-

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[2] Some of the hearing examiner's statements on the subject follow:

> "'Well, as I stated before, I believe this information in fairness to Respondent ought to be turned over to Respondent's counsel . . . .' (Tr. 793.) * * *."

view reports are not to be released for inspection where the witness interviewed has testified on direct unless such reports satisfy the requirements of the so-called Jencks Act for the production of witnesses' prior statements (18 U.S.C. § 3500 (1958)). Under section (e) of such Act, a statement subject to production is defined to mean

> '"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> '"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a *substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.*"' (Emphasis supplied.)"

Although the Hearing Examiner is of the opinion that the policy of the Commission on the production of interview reports as established by prior rulings is lacking in logic and fairness, he did attempt to apply the requirements of the so-called Jencks Act.

The United States Court of Appeals for the Fourth Circuit in *United States v. Hemphill* (1966), 369 F.2d 539, 542, stated:

> "[1] The qualified privilege of withholding the names and statements of informants has been repeatedly and consistently upheld by the Courts. This Court has done so, and there has been a succession of such cases in the Fifth Circuit the last of which was decided on October 31, 1966.
>
> "[2] The qualified privilege must give way shortly before and during the trial of an actual enforcement proceeding to the extent that fairness re-

> quires the Secretary to furnish lists of prospective witnesses and written statements obtained from them. In that process, the fact that some witnesses were early informants may incidentally appear, but, as the Fifth Circuit clearly pointed out in the *Robinson & Stephens* case, the policy favoring anonymity of informants must give way when it conflicts with the countervailing policy favoring fair and orderly trials and pre-trial procedures.
>
> "[3] This was the concern of the District Judge. We share his conviction that when the United States, a cabinet official, or an agency of the United States comes into the Court as a plaintiff, they are subject to the same rules as private litigants, and the open disclosure which is now demanded of litigants in the federal courts, because of its fairness and its contribution to accuracy in the factfinding process, is equally demanded of such plaintiffs."

In *Inter-State Builders, supra,* the Commission has recognized in words (but disregarded) the principles laid down in *Hemphill* when it said:

> "As the Supreme Court's decision in the *Jencks, Hickman* v. *Taylor* and *Palermo* cases make clear, the problems raised in determining the discovery rights of defendants in this area of witness' statements are exceedingly complex.
>
> "On the one hand, there is the basic consideration of fairness to administrative respondents. While the problem is of course more acute in criminal proceedings, where defendants have more limited discovery rights than are available in civil or administrative proceedings and where the defendants' rights in jeopardy in such cases may go to the essence of an individual's liberty, nevertheless, as the courts and the

Commission have asserted many times, questions of fairness to civil defendants or respondents are basic to the administration of justice. The need for steadfast and zealous protection of defendants' or respondents' rights is not only the concern of the courts, but, where the Government is the moving party, it also becomes of equal concern to the administrative agency (Pages 17-18).

• • • • •

"The Ninth Circuit has held that an administrative agency 'may not avoid [the Jencks rule] by adopting regulations inconsistent with its requirements.' *Harvey Aluminum* v. *N.L.R.B.*, 335 F.2d 749, 753 (9th Cir. 1964). One of the basic ingredients of the Jencks rule is that the statement is 'to be turned over at the time of cross-examination' (*Palermo* v. *United States*, 360 U.S. 343, 345 (1959) to facilitate proper cross-examination,' *United States* v. *Rosenberg*, 257 F.2d 760, 763 (2nd Cir. 1958); aff'd. 360 U.S. 367 (1959); *Basic Books* v. *F.T.C.*, 276 F.2d 718, 722 (7th Cir. 1960). A court might rule that delaying cross-examination pending submission of an application for production to the Commission and a ruling by the Commission does not constitute production at the time of cross-examination. However, of even greater importance is the delay in the hearing and the unfairness to complaint counsel which would result from such a procedure. Requiring such application to be addressed to the Commission would interrupt the hearings contrary to the intent of the Commission Rules 3.1 and 3.16(d), woud inconvenience the witness, would prevent respondents from conducting an immediate cross-examination and might severely prejudice complaint counsel in that the delay would give respondent additional time to study and prepare for cross-examination and might therefore encourage him to make demands for production which he might not otherwise make. For all of these reasons, we hold that respondents' counsel was correct in directing his demand for Jencks statements to the hearing examiner and that the examiner should have called for the reports in question, examined them and should have held whatever hearings were necessary in order to establish whether any statements contained therein had been approved or adopted by the witness and the circumstance of the recording by the attorney in order to determine whether they are summaries or substantially verbatim transcriptions.

"Complaint counsel's argument that respondents' demand must fail because the interview reports in question are privileged as attorney's work product was rejected implicitly by the Supreme Court in its *Jencks* decision and directly by all other courts in cases under the Jencks Act in which the issue has been raised. *United States* v. *Hilbrich*, 341 F.2d 555, 557 (7th Cir. 1965); *United States* v. *Aviles*, 315 F.2d 186 (2d Cir. 1963), vacated and remanded *sub nomine; Evola* v. *United States*, 375 U.S. 32 (1963), aff'd. on remand, 337 F.2d 552 (1964), *cert. den.*, 380 U.S. 906 (1965); and *Saunders* v. *United States*, 316 F.2d 346 (D.C. Cir. 1963), *cert. den.*, 377 U.S. 935.

"In the *Saunders* case, the Court explained its reasoning in refusing to read the 'work product' rule in the Jencks Act:

> 'The work product rule * * * protects the mental processes of the attorney * * * [It is possible to protect statements taken down by an attorney,

and still preserve the sanctity of the attorney's work product. If a government attorney has reported only his own thoughts in his interview notes, the notes would seem both to come within the work product immunity and to fall without the statutory definition of a "statement." But if the attorney has made only a substantially verbatim record of his interview, then, quite the contrary, his notes constitute a "statement" and include no protected material flowing from the attorney's mental processes. * * * If the notes contain both verbatim remarks of the witness and personal remarks of the attorney, then paragraph (c) of the act requires that the district judge inspect the statement and excise the protected material if this is possible' (pp. 349-350). [Pages 29-31.]

* * * * *

"Complaint counsel's further contention in his brief that 'nothing could be gained from further cross-examination with the aid of Commission interview reports,' is equally without merit as a ground for sustaining the examiner's refusal to consider respondents' request for the production of statements. The Supreme Court in its decision in *Palermo v. United States*, 360 U.S. 343, 346 (1959) made it clear that its *Jencks* decision related solely to the production for impeachment purposes of specific statements relating to the subject- matter of a witness' testimony after proper demand and not to their admissibility and that the trial court's duty was to determine whether Jencks statements existed and not to determine whether such statements were of 'value' for impeachment purposes. Thus, any questions of 'value' are irrelevant where in fact a Jencks statement exists" (Page 32).

It was further stated (page 8):

> "The Courts have held that the Jencks Act requirement that transcriptions of oral statements shall be made 'contemporaneously' does not mean 'simultaneously' (*United States* v. *McKeever*, 271 F.2d 669, 675 (2nd Cir. 1959) and *United States* v. *Waldman*, 159 F. Supp. 747, 749 (D. N.J. 1958). Thus, in the *Waldman* case, it was held that the transcription which was made while the agent's 'memory was fresh' from notes taken while the agent was talking to the witness constituted a contemporaneous transcription.
>
> "The Courts have further held that a 'substantially verbatim recital' of an oral statement does not mean 'precisely verbatim' (*United States* v. *McKeever*, *supra*, and *Williams* v. *United States*, 338 F.2d 286, 288 (D.C. Cir. 1964)) and that a statement may be 'substantially verbatim' even though it is made in the third person. *Williams* v. *United States*, *supra*. Furthermore, variances such as 'grammatical and syntactical changes, rearrangement into chronological order, [or] omissions [or] additions of information immaterial for impeachment purposes' will not prevent a transcription from being 'substantially verbatim'. *Campbell* v. *United States II*, 373 U.S. 487; 495, fn. 10 (1963); *United States* v. *Aviles*, 337 F.2d 552, 558 (2nd Cir. 1964). A summary of an oral statement, however, is not considered to be a substantially verbatim transcription. In *Palermo* v. *United States*, 360 U.S. 343 (1959), the Court held that a 600-word summary of a 3½ hour conference was not an oral statement within the meaning of the Act."

In complaint counsel's interlocutory appeal, it was revealed that a certain number of the persons subpoenaed to appear at the Los Angeles hearings "could not be served" and "presumably will not appear" (p. 7). Thereafter, on the information supplied by complaint counsel that only two witnesses from the Los Angeles area would be used, the Los Angeles hearings were cancelled, and it was directed that the two witnesses be brought to the New York City hearings. Pursuant to agreement of counsel herein, an order was issued on October 25, 1968 rescheduling hearings in Boston beginning on November 13, 1968 (3 days) and in New York City on November 18, 1968 (5 days) for the purpose of permitting complaint counsel to complete their case-in-chief and for the respondents to put in their defense.

Hearings were resumed at Boston on November 13, 1968, at which time the Hearing Examiner stated on the record that apparently he had not made himself clear as to the basis for his rulings of May 21, 1968 striking the direct testimony of witnesses Kroll and Rochon. He stated he came to the conclusion, upon reading each of the field reports, that it was a statement within the meaning of the Jencks Act, being a substantially verbatim recital of what the witness told the investigating attorney. He recited the procedures that he, like most lawyers, followed when making an investigation: He would make notes at the time of the interview and, after dictating a statement, the notes would be destroyed. Under such circumstances, he stated, the statement should be considered contemporaneous with the interview (Tr. 816-19).

It developed at the second Boston hearings that complaint counsel had not been forthright and candid with the Hearing Examiner on May 21st by failing to reveal that they had in their possession notes which Complaint Counsel McNally had made with respect to Witness Rochon at the time of the interview. It was also learned that Commission Attorney Dinardi had in his possession notes with respect to Witness Kroll. Furthermore, this information was not made known to the Commission by complaint counsel in their interlocutory appeal.

After direct examination had been completed of the first witness called at Boston in support of the complaint on November 13, 1968, the witness, Mr. Everett M. Russell, said he had been questioned in 1965 with reference to matters on which he had given testimony by a representative of the Commission, whose name he could not recall. He said the investigator made notes at the time of the interview. Respondents' counsel requested that he "be furnished with the memoranda under the Jencks Rule in connection with this witness before proceeding with cross-examination" (Tr. 845-46). There was turned over to the Hearing Examiner a three-page field report, dated 10/27/65, made by John J. McNally, Attorney, of an interview that took place on August 2, 1965. Attached thereto was a list of nine documents obtained from Mr. Russell at the time of the interview (CX 540 A-D—*in camera*). The Hearing Examiner read the report (in camera) and called Mr. McNally as a witness. On voir dire, Mr. McNally said that, while stationed in the Commission's Seattle Field Office as a trial attorney, he was given an assignment as an investigator in this case for about three months (apparently in 1965), at which time he interviewed a number of people in Boston and the surrounding territory; that he made notes—"I don't know whether I did it while I talked to him or outside in my car" (Tr. 850); and that he dictated his field reports, relying upon his notes, the exhibits given him, and his recollection. He testified that he had the notes in the hearing room and, on the request of the Hearing Examiner to see them, Mr. McNally responded (Tr. 850):

> "Yes. Your Honor, could the record show I am handing you a group of scribbled scratch sheets, and I pointed out that two pages to you that I state are the notes relating to my interview with this witness."

Included in the group were notes relating to his interview of Witness Rochon, as well as other persons. The Hearing Examiner looked over the notes and answered that he was not able to read them and that they would serve no useful purpose. Under the circumstances, it was the opinion of the Hearing Examiner that Mr. McNally's field report on the Russell interview, with certain deletions, was a statement within the meaning of the Jencks Act, which should be turned over to respondents' counsel for use in connection with cross-examination—which complaint counsel refused to do in view of the Commission's ruling. Mr. McNally, when asked if he wanted to furnish the notes to respondents' counsel, replied (Tr. 864):

> "No, your Honor. They are not shorthand. If— I have never taken shorthand in my life. They are abbreviations and scribbles."

The Hearing Examiner then said (Tr. 865):

> "* * * Frankly, I couldn't read those. I question whether or not you can read them. I question whether or not the Commission can read them; * * *"

Witness Rochon was recalled as a witness at Boston on November 13th, and at the outset he was examined on voir dire by the Hearing Examiner. With the consent of respondents' counsel, the field report prepared by Mr. McNally, which was the subject of the interlocutory appeal, was shown to the witness. The witness, after reading the third and fourth paragraphs thereof to himself, testified that what was stated was substantially verbatim of what he told Mr. McNally (Tr. 887-893). Mr. McNally, called to testify on voir dire, testified that he made notes at the time of the interview or thereafter on the same day, and that in dictating the field report he used the notes, the documents that were turned over to him by Mr. Rochon, and his recollection (Tr. 894-99). The Hearing Examiner stated on the record (Tr. 897):

[redacted]

> "* * * Let the record show that in the opinion of the Hearing Examiner, that all except the first two paragraphs of this interview report is a statement within the meaning of the Jencks Act and should have been supplied by Complainant's counsel when he was requested to at the time that this witness appeared before us on May the 21st. In the opinion of the Hearing Examiner, it is the words, it's a substantial verbatim statement of the testimony of the witness, Mr. Rochon, and represents his own words. * * *."

In keeping with the order of the Commission, the testimony of Mr. Rochon on May 21, 1968 was reinstated and the respondents, on direction, and over their objections, proceeded with the cross-examination without the use of the interview report (Tr. 899-900).

At the time Mr. Kroll was recalled to testify on November 13th, he was examined on voir dire by the Hearing Examiner. He stated that he was interviewed "the better part of an hour" (Tr. 907) by Mr. Dinardi in October of 1965, and that he told the interviewer in his own words substantially what he had testified to at the previous hearing. When shown the field report, with the consent of respondents' counsel, and after reading the second paragraph to himself, the following exchange took place (Tr. 909):

> "Hearing Examiner Johnson: Does that represent what you told the investigator attorney for the Commission?
>
> "The Witness: That's right, sir.
>
> "Hearing Examiner Johnson: And would you say that that represents your words in substance?
>
> "The Witness: Well, I wouldn't put it in those exact words, but the meaning is there. What I did tell him, in substance, that's what I did tell him.

"Hearing Examiner Johnson: In substance that is what you told him?

"The Witness: Yes, sir."

At the request of the Hearing Examiner, Mr. David W. Dinardi appeared and was sworn as a witness (Tr. 911-925). He testified that he was admitted to the Bar in November 1962, and since that time, less six months when he was in the Service, he has been an attorney for the Commission, stationed in the Boston Office; that he interviewed Mr. Kroll in his office in Springfield, Massachusetts, on October 15, 1965, and the field report involved in the interlocutory appeal was typed by one of the girls available to him on November 2, 1965, but he could not say when it was dictated by him; that he made notes with reference to the interview either at the time he was in Mr. Kroll's office or out in his automobile thereafter (Tr. 912-13); and that the notes are made "At least before" he conducts another investigation (Tr. 921). The notes, written on four legal-sized sheets, were turned over to the Hearing Examiner who read them in camera. When Mr. Dinardi was asked if the notes represented what the witness told him, it was impossible for the Hearing Examiner to get a candid answer. The investigator was told to

> "* * * take time and carefully look over those four sheets of your notes and point out anything that does not represent what this witness told you. Go through and take your time. Take the first page. Look that over carefully every word (Tr. 917).
>
> * * * * *
>
> "The Witness: Your Honor, I think to put all of this in the proper perspective, based on the manner in which the question was phrased, I don't think I could.

"By the Hearing Examiner:

"Q. There is nothing in there except what this witness told you? All right, now take page 2. A. The answer is the same.

"Q. All right, page 3? A. Yes, the answer is the same (Tr. 917-18).

* * * * *

"Q. Now, page 4, look at that. A. Yes, sir. The answer would be the same.

"Q. All right. A. But that is my work product, is it not?

"Q. You call it your work product. That's a conclusion I don't agree with. In other words, as I look at it, it's the—— In other words, the only source of the information was this witness. No one else gave you the information, correct, on this interview report? A. We did have a conversation in Mr. Kroll's office.

"Q. And you got this information from him? From Mr. Kroll? A. Yes, sir.

"Q. That's it. No one else? A. No, sir.

"Q. That's right" (Tr. 918-19).

The Hearing Examiner stated that, in his opinion, the notes represented substantially verbatim the words of the witness on the matters which he testified to on direct examination on May 21st, that it was a statement within the meaning of the Jencks Act, and directed that the notes be turned over to respondents' counsel. After some argument, complaint counsel complied and respondents' counsel proceeded and completed cross-examination (Tr. 919-925).

In addition to Messrs. Rochon, Kroll and Russell, heretofore referred to, complaint counsel called four witnesses at the hearings held at Boston on November 13 and 14, 1968, and on the request of respondents for pre-trial statements, it was disclosed that each witness had been interviewed by one or more of the Commission's representatives. Witness Stephen F. Quill was interviewed by Mr. David W. Dinardi on February 6, 1968 and the hadwritten notes of the latter concerning the interview were submitted to the Hearing Examiner, at which time Mr. Dinardi stated, "I don't know whether I took the notes in Mr. Quill's office or in my automobile afterwards" (Tr. 976). After reading the notes in camera and questioning the witness and the investigator on voir dire, it was the opinion of the Hearing Examiner that the notes, with twenty words blocked out, were a statement within the meaning of the Jencks Act. A directive by the Hearing Examiner that the notes be turned over to respondents' counsel was complied with (Tr. 969-997).

Witness Morton Kaufman was interviewed by Mr. McNally on July 30, 1965, and the latter's handwritten notes (CX 543 A-E *in camera*) and field report (CX 542 A-F *in camera*) were submitted to the Hearing Examiner. After reading the report and notes in camera, the Hearing Examiner questioned the witness on voir dire, who stated that the interview lasted an hour or less, and that he had never seen the report nor had anyone discussed it wtih him at any time. With respondents' counsel not objecting, Mr. Kaufman was asked to read to himself the third paragraph of the report and, after doing so, he testified that what he read was what he had told Mr. McNally at the time of the interview, and that it was, in effect, his words. Mr. McNally on voir dire testified (Tr. 951-960) that he was admitted to the Bar in 1951, and that his entire career as a lawyer has been with the Federal Trade Commission. With reference to his notes, the following exchange took place:

> "Q. Would you look those over and can you tell me what those notes are? Could you read them?

* * * * *

A. Well, as you can see, if you could try to read it, it's almost all abbreviated.

"Q. But it's difficult to read. You couldn't make it out unless you understand your abbreviations, is that correct? A. It's difficult, yes.

"Q. In other words, would you have any difficulty reciting—making a copy of those notes and saying exactly what those notes contained interpreting? A. I'd have exceedingly great difficulty, except if it was fresh in my mind. This is four years a[g]o.

"Q. Anyway, the Hearing Examiner has the same opinion" (Tr. 953-54).

Mr. McNally volunteered (Tr. 955-56):

> "Absolutely. I think it should be understood and made clear, your Honor, while I am under oath that I contacted 50 or 100 people during three months on several cases—not just this case but two or three other cases. Now—I got back to Seattle two or three months later and dictated them from these notes and the documents. And with Mr. Kaufman, there were documents, which of course are in evidence now. I based my interview report on what I could make out of my notes, and they were clear in my mind at the time because I had a better recollection ten weeks later than I have three or four years later. Now, how much was the documents and how much was recollection and how much was notes, I just don't know, your Honor. I don't think anybody in the world could establish."

The Hearing Examiner ruled that the field report, with portions blocked out, was a statement within the meaning of the Jencks Act, and directed that it be turned over to respondents' counsel for use in cross-examination (Tr. 960-61), which complaint counsel refused to do.

Witness Sheldon Auratin was interviewed by Mr. McNally on August 3, 1965, and Mr. McNally's notes (CX 552 A-O *in camera*) and field report, dictated on October 28, 1965 (CX 544 A-E *in camera*) were submitted to the Hearing Examiner. After reading the report and scanning over unreadable notes in camera, and questioning the witness and Mr. McNally on voir dire, the Hearing Examiner found that the report, with the exception of the first paragraph, was a statement within the meaning of the Jencks Act, and directed that it be turned over to respondents' counsel for use in cross-examination. This complaint counsel refused to do. With reference to a transaction that took place after the McNally interview, the witness was also interviewed by Mr. John Vittone, who at the outset was assigned to this case as an attorney, but subsequently entered the Service. An interview report prepared by Mr. Vittone was submitted to the Hearing Examiner, who read the same in camera. On his direction, blocking out the first four paragraphs thereof for the reason that they related to matters not averred on direct examination, it was turned over to respondents' counsel for use in cross-examination (Tr. 1023-1034).

Witness Walter F. Martin was interviewed by three representatives of the Commission. A five-page field report made by Mr. McNally of an August 4, 1965 interview, dictated on October 28, 1965 (CX 553 A-E *in camera*), a memorandum, dated October 28, 1965, prepared by Mr. Dinardi, and a two-page, undated interview report by Mr. Vittone were submitted to the Hearing Examiner, which he read in camera. After a voir dire examination of the witness and Mr. McNally, the Hearing Examiner came to the conclusion that the McNally report was a statement within the meaning of the Jencks Act, ordering that it be submitted to respondents' counsel for use in cross-examination, which complaint counsel refused to do. The Hearing Examiner ruled that the Dinardi report was not a Jencks Act statement to be turned over to respondents' counsel, but that the Vittone report was such a statement, and a directive that it be turned over to respondents' counsel was complied with (Tr. 1067-1074).

It should be noted that at the hearings which commenced in New York City on May 6, 1968, and continued for nine days, complaint counsel revealed that they had in their possession interview reports as to 19 of the witnesses which were submitted to the Hearing Examiner. After reading each *in camera* the Hearing Examiner in all except one instance decided that the reports be turned over to opposing counsel for the purpose of cross-examination, which direction was complied with by complaint counsel without objection. Although not stated on the record, it was the opinion of the Hearing Examiner that such field reports were statements within the meaning of the Jencks Act. The Hearing Examiner declined to require one of the reports to be turned over to respondents' counsel for the reason that it did not contain anything therein which related to the testimony given on direct examination.

It should also be stated that each instance heretofore refered to, where the notes or field reports were received *in camera* there was a directive on the record by the Hearing Examiner that such exhibits be subject to inspection only by the Commission or any reviewing authorities.

Hearings were held at New York City on November 18-19, 1968, at which time complaint counsel called five witnesses and completed their case-in-chief (Tr. 1191-1208). A motion by respondents' counsel to dismiss upon alleged failure to establish a prima facie case was denied by the Hearing Examiner.

The respondent's put in their defense in New York City in a one-day hearing on November 20, 1968, at which time the Respondent Henry Pinkwater and Robert Shanon, Comptroller for the Star Office, testified. Complaint counsel offered no rebuttal and on the above date the record was closed for the receipt of evidence. By agreement, December

27, 1968, was fixed as the time for filing proposed findings and January 10, 1969, for filing replies thereto. On motion of complaint counsel, the time for filing proposed findings was extended to January 6, 1969. Proposed findings were submitted by the parties within the time stated; but no replies were filed. The proposed findings submitted by complaint counsel are worthy of commendation in that they contained a detailed recital with proper references of by virtue of the laws of the State of New York, with its aminer has found to be accurate in practically al instances and most useful in the preparation of the Initial Decision.

The following abbreviations have been used herein: "C" for Commission's Complaint; "A" for Respondents' Answer: "Par." for Paragraph; "Tr." for Transcript of Proceedings; "CX" for Commission's Exhibit, and "RX" for Respondents' Exhibit.

The Hearing Examiner has given full consideration to the proposals submitted and all proposed findings not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the Hearing Examiner makes the following findings of fact and conclusions.

Respondent Star Office Supply Co. is a corporation organized (in 1953), existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located in rented premises known as Stationer's Exchange Building at 5106 Broadway in the City of New York, New York. It has about 17 or 18 employees and they are working in the office and shipping department (Tr. 1228). Its volume of business over the past five years is as follows:

1963—$1,017,455.20
1964—$1,107,851.05
1965—$1,256,296.31
1966—$1,335,420.30
1967—$1,640,589.21
1968—$1,167,860.74 (Tr. 1220).

The company operates on a fiscal-year basis, from October 31 to October 31. The figure for 1968 is from October 31, 1967, to August 31, 1968 (C. Par. One; A. Par. 1; Tr. 1220).

The respondent Henry Pinkwater acquired an interest in the firm in 1955, and from that time to 1960 he was its vice president selling its merchandise under his own name and under the trade name Century Supply. In 1960 he, with his wife, purchased all of the stock in Star Office and since that time he has been president of the corporation, formulating, directing, and controlling its acts and practices. His business address is the same as that of the corporate respondent. Mrs. Pinkwater was vice president of the company at one time, but it does not appear that she was ever active in its affairs. The Secretary of the corporation is Loretta Wittenstein, an employee of many years. Its comptroller from October 1963 to November 1967 was Daniel L. Friedman, a position occupied by Robert Shanon from December 1967 to date. The last three mentioned owned no stock in the company and during the mentioned periods were paid exclusively by Star Office.

The respondent Henry Pinkwater, in conjunction with acts and practices which are the subject of this proceeding, does business under trade names, including Century Supply Co., Central Stationery Co., Dorex Office Supply Co., Kent Supply Company, Normandy Office Supply Co., Office Systems, Oxford Systems, Pioneer Supply Company, Wald Office Supply Co., York Supply Company, and Pioneer Credit Company. Pursuant to the laws of the State of New York, the said respondent signed certificates declaring his intention to conduct business under the designated names with the County Clerk, New York County, State of New York (CX 1-11). In addition to the aforementioned, Respondent Pinkwater does business as Stationery Wholesalers, Roman Company, and Mid-East Supply Company (Tr. 327-339). All of the business of the trading companies was carried on from the Star Office premises and the orders were filled by Star.

The respondent Henry Pinkwater also carried on business through Hanger Company, a corporation located at 251 West 30th Street, New York, N.Y. He was its only stockholder, supplied all of its funds and apparently was responsible for its policies. All the purchase orders generated by Hanger were filled by Star Office. Eventually, Hanger was closed and Mr. Pinkwater assumed all of its liabilities and paid its debts (Tr. 83-85).

Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of stationery and office supplies to the public. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York, to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of stationery and office supplies of the same general kind and nature as that sold by respondents.

Paragraph Five of the Complaint reads in part:

> "In the course and conduct of their sale and distribution of respondents' stationery and office supplies, . . . salesmen falsely and deceptively:
>
> "(a) Represent to prospective purchasers, contrary to the fact, that they are recommended by officials of the prospect's firm or of one of its

branches, or of affiliated or associated firms, or that they have a personal or other relationship with some such official.

"(b) Describe themselves, contrary to the fact, as having past or prospective associations with various patriotic or public service organizations or branches of Government, including, but not limited to, the United States Departments of State and Defense, the United Nations, and Radio Free Europe.

"(c) Solicit orders by stating, contrary to the fact, that they are disposing of, or liquidating stationery and office supplies for their firm, or for others having an interest therein.

"(d) Pad or 'kite' orders by utilizing confusing or misleading nomenclature and descriptions to denote the quantity of merchandise being ordered, which facts are frequently not known to the purchaser until his inspection of the merchandise shipment, or upon his subsequent receipt of a bill setting forth the actual quantities and the unit and total prices therefor."

* * * * *

Paragraph Six of the Complaint reads:

"In the further course and conduct of their business, respondents utilize the following unfair, false, misleading and deceptive practices, methods and means in connection with the sale and distribution of their products:

"(a) Respondents ship stationery and office supplies which frequently differ with respect to brand names, type, quantity, size or quality from that represented or described by the salesmen in inducing orders and ordered by the purchaser.

"(b) Respondents thwart and prevent cancellation of all or a part of orders by customers who assert bona fide reasons therefor, including acts or practices of salesmen as alleged in Paragraph Five hereof. Respondents, in a substantial number of instances, have failed and refused to accept such cancellations and to put the purchaser in touch with the particular salesman who induced their order by resorting to statements such as that the salesman must have been misunderstood, is out of the country or is not available; that he has left his firm or that the firm is no longer in business; or that respondents have no knowledge of, or responsibility for, his acts or practices. Respondents also prevail upon such purchasers to retain and pay for the merchandise, or attempt to mollify them by way of extra inducements, such as extending the terms for payment or reducing the purchase price.

"(c) In a substantial number of instances when purchasers refuse to pay for merchandise, respondents send letters or other communications under such names as Pioneer Credit Co., and by that and other means, falsely purport to be factors, assignees of the account or other third parties, in order to induce and coerce payment for the merchandise.

"Therefore, the acts, practices, statements and representations of respondents, as aforesaid, are unfair, false, misleading and deceptive."

Based upon the evidence which will hereinafter be set forth, it is the opinion and finding of the Hearing Examiner that the charges of the Complaint have been sustained. In arriving at this conclusion, consideration has not been given to testimony of witnesses Russell, Rochon, Kaufman, Auratin, and Martin, where complaint counse refused to submit to respondents' counsel so-called Jencks statements for use on cross-examination. The testimony of such wtinesses has not been stricken so the Commission is in a position to give it such weight as it desires.

Walter J. Kroll, Controller of Van Norman Machine Company, Springfield, Massachusetts, testified (Tr. 708-752) that his company is a division of Universal American Corporation, whose officers consisted of Frank Levian, president, and Francis Gould, chairman of the board. In November 1963, he was contacted by a Mr. Sessler (one of the incorporators of Star Office) representing Office Systems, Inc.

> "He told me that he was personally acquainted with Mr. Levian and Mr. Goaid; and from a recent contact wtih both those parties, he was given permission to solicit orders for office supplies from each of the establishments of Universal American Corporation. . . . Mr. Sessler said that he had a business that he wanted to close out by disposing of all of its merchandise because he was leaving the country to live in Europe and he needed the money for traveling and living expenses. He also said that he had a family living in Europe which he was anxious to join" (Tr. 710-11).

The witness "instructed the purchasing agent to place a 6-month supply—and order for a 6-month supply of our fast-moving items. The amount of the order was approximately $1,200" (Tr. 713; CX 528-A-529-C). When the invoice arrived Van Norman had been billed for $4,451.76 worth of merchandise (Tr. 718; CX 530-A-B). The witness received a telephone call "from a gentleman named Freid [sic] . . . He stated that there was an invoice in the amount of $4,451 which remained unpaid; and since he had purchased the accounts receivable from Office Systems, Inc., he would like to get his money from Van Norman" (Tr. 721). The witness "told Mr. Fried of the discrepancy [and asked] him to give . . . an address where we could return the excess quantities of [the] supplies. He [Fried] pleaded with me [witness] to keep all of the supplies which had been delivered because he was desperately in need of money; and he would prefer not to issue any credit for any supplies that might be returned.". The witness refused to pay until he was authorized to return the excess quantities of merchandise and until a credit memorandum had been issued to Van Norman (Tr. 728). The witness subsequently received authorization to return the merchandise and a credit memorandum for $2,747.41 (CX 532, 533). The witness kept and paid for $2,116.46 worth of merchandise; and Van Norman's check was endorsed by Star Office Supply Co., Inc. (CX 534-A-B). It is apparent that the Mr. Fried herein referred to is Mr. Daniel L. Friedman, who at the time was employed as Comptroller of Star Office Supply Co.

In connection with his defense, Respondent Pinkwater had no explanation for the foregoing testimony.

Thomas Lyons, Purchasing Agent and Office Manager of Ellsworth Industrial Supply Company, Stratford, Connecticut, testified (Tr. 425-455) that he received a phone call in the summer of 1965 from someone who did not identify himself but said he represented the York Supply Company. He said he had been referred to Ellsworth by one of its largest suppliers, namely Accurate Bushing Company of Garwood, New Jersey.

> "They called and said that they were selling office supplies at a twenty-precent discount off the normal list prices on these items. I cannot recall exactly the terminology, but it was something to do with the profits or liquidation, which I cannot recall exactly, which were going to Radio Free Europe" (Tr. 427).

A written order was placed, which among other things specified three boxes of Bostitch staples and three boxes of Swingline staples (CX 518). Ellsworth was invoiced by York Supply Company on 7/12/65 in the amount of $189.76, which included 60 boxes of Bostitch staples in the amount of $103.20 and 60 boxes of Swingline staples at $62.40. On cross-examination it developed that all of the merchandise, with the exception of ten boxes of Swingline staples, was returned to the shipper and York issued a credit memorandum in the amount of $179.36 (CX 47). The balance of $10.40 was paid by Ellsworth, which closed the matter.

In connection with his defense, Respondent Pinkwater had no explanation for the foregoing testimony.

George C. Gardill, Assistant Treasurer of Jarka Corporation of Baltimore, Maryland, testified (Tr. 622-641) that he received a personal call from a Mr. Morton:

> "He said that he had been in contact with some of our people in New York and he had been recommended to come down to Baltimore and try to sell us some stationery" (Tr. 624).

Mr. Morton did not mention any company. The witness says he placed an order but couldn't recall exactly what was ordered. Century Supply Company, 437 West 21st Street, New York, N.Y., invoiced Jarka Corporation of Baltimore as of 5/1/66, listing pencils, pads, carbon paper, markers, and pens, totaling $496.90 (CX 485). The witness said they were shipped 12 boxes of carbon paper, kept one, paid for one. He said he was certain he did not order 12 boxes. He was certain he didn't order ten gross of pencils because he didn't have use for ten gross, did not order over two gross of each. He kept $257.62 worth of the merchandise for which they paid Century and returned the balance. Payment made on 10/4/66. He was contacted again by Mr. Morton and gave another order to Century Supply Company, dated 2/20/67, in the amount of $326.72 (CX 486). The witness said the stationery was paid for although it was more than he ordered again. Subsequently the witness was contacted again by Mr. Morton, by phone, and the result of that conversation was that he placed a third order and Century Supply Company invoiced the Járka Corporation on 4/17/67 in the amount of $931.88 (CX 526), which was paid on 6/23/67. Approximately two months after the receipt of the third order, they received a package from Century, through Railway Express, which was not accepted for the reason that he stated it was not ordered and they did not want it. When aswed about paying for these unordered goods which they had received, he explained: "For instance, it was pencils that we can always use. It was just more than we wanted at the time, but it was not something that would go to waste. They can always be used" (Tr. 632).

On cross-examination, when asked if the merchandise received was satisfactory, the witness replied that "the carbon paper was definitely not satisfactory. That's why it was returned" (Tr. 640). They subsequently did not reorder any carbon paper.

In connection with his defense, Respondent Pinkwater had no explanation for the foregoing testimony.

Edward G. Naso, Assistant to the Comptroller, E. F. Timme & Son, New York, New York, testified (Tr. 517-530) that during approximately November of 1966, he was called into the office of Mr. John S. Mullin, Comptroller of his company, who introduced him to a Mr. Paolillo of the Star Office Supply Company, 1506 Broadway, New York, N.Y. Mr. Mullin explained to the witness that Mr. Paolillo had been referred to them by Mr. Charles Bergamini, an executive officer of their new North Carolina company; that Paolillo was dissolving his business and intended to give them a good deal on office supplies. Paolillo further stated that his partner had died and he felt that he had to dissolve the business—for this reason he was able to give a very good price on office supplies. Mr. Paolillo was told that they would consider giving him an order if the prices were good but it would take about a week to decide what to order. No definite order was given at the time. Subsequent thereto the witness called the Star Office Supply Co. at the telephone number that had been given him and he asked to speak to the owner of the business. Someone on the phone told him that Mr. Paolillo was a salesman not the owner. He does not recall whether or not it was a man or a woman who took the call at the Star Office Supply Co. The witness asked that Mr. Paolillo be requested to contact him, which he did—by phone—either the same day or a day after, at which time he was told by the witness that they had decided against doing any business at all. ". . . the company is not in a position or desirous to do any business with him because his story did not check out, and the story of his being referred by Mr. Bergamini— —" (Tr. 528). Timme & Son never ordered any goods from Paolillo, never received any goods nor were they billed for any goods.

In connection with his defense, the only testimony given by Mr. Pinkwater was that Mr. Paolillo had been one of his jobbers for a few months, but he was no longer with him; that he discontinued selling to him because he had a few complaints (Tr. 1282-83).

Stephen F. Quill, Purchasing Manager of The Colonial Press Inc., Clinton, Massachusetts, testified (Tr. 970-997) that in 1966 he received a phone call from a person who said his name was Mr. Kowal.

> "He [Kowal] indicated at the time that he was in the United States from Hungary on a visa and that his visa had expired and he intended to go back to Hungary. He was looking to sell some of the office supplies that he had in stock, would I be interested in buying any. At first I told him no" (Tr. 970).

Kowal called back in about three weeks; and on 1/19/66 a written order was transmitted to Central Stationery Co., 30-15 35th Avenue, Long Island City, New York, attention Mr. Kowal, for "1 CTN #1 Paper Clips (500 boxes of 100 ea.) $.79/M" and "24 Pkg. Pencil Carbon Paper 2.60/ea." The total amounted to $101.90. Central Stationery Co., Room 1, Stationer's Exchange Bldg., 437 W. 218th Street, New York City, N.Y., shipped and invoiced Colonial Press for 500 boxes of Gem Paper Clips at $.79 per M or $39.50; and "24 BX 600/250 Pencil Carbon 2.60 per C $156.50", for a grand total of $195.50. Colonial paid the amount of invoice, less one percent (CX 339). The witness was sent a watch as a gift, which he returned. In a subsequent phone call, Mr. Kowal, "said he was disappointed that I [the witness] hadn't kept the watch. At that time I told him I was no longer interested in doing business with him. That was the end of that" (Tr. 972).

In connection with his defense, Respondent Pinkwater had no explanation for the foregoing testimony.

Russell C. Adams, Secretary-Treasurer of The Eastern Company, Naugatuck, Connecticut, testified (Tr. 612-622) that approximately January of 1967 he received a phone call from a person who said his name was Charles DeRose. DeRose did not identify the firm that he was with but he stated he was a student at Ohio State University and that his father had recently passed away and that he was to be drafted the following Monday and, under these circumstances, his mother was going to have a hard time closing a stationery business that his father had had in New York City. He stated he had a professor at Ohio State who was a friend of Clifford H. Lambert, a vice president of The Eastern Company (Tr. 613); that the professor had contacted Mr. Lambert who suggested that he get in touch with the witness; that he could probably help him out.

> "My original conversation with Mr. DeRose indicated—when I asked him about cost, he indicated he would send us his own invoices so that I would know what it cost him, and that I could pay what it cost him for those goods I wanted, and I could return those I didn't want" (Tr. 617-18).
>
> "I ordered what was put to me as a—well, I don't know the words exactly, but I do remember the words 'odds and ends'. I seem to recall it was a small quantity of odds and ends. There were no specific quantities" (Tr. 616).

On January 17, 1967 (CX 317), a letter was written by Eastern to Imperial Stationers, 437 West 218th Street, New York, N. Y., stating that no invoice had been received and that they were unable to conclude the transaction as they were unable to establish a value for the items received. Two or three weeks later an invoice was received from Imperial Stationers listing seven items, totaling $756.32. The witness phoned the offices of Imperial Stationers and asked about returning the goods. "They told me they weren't set up to return the goods. I said, 'That's too bad until I get shipping instructions.' I did then get shipping instructions" (Tr. 619). On March 13, 1967, which was a day or two after the phone conversation, Eastern wrote Imperial for written shipping instructions. On March 16, 1967, Imperial Stationers, by L. J. Witte (the name employed by

Loretta Wittenstein, the Secretary of Star Office), authorized Eastern to return the merchandise that they could not utilize. Upon receipt of the authorization, the goods were returned (Tr. 621). (Note: the invoice and packing slip from Imperial (CX 315 and 316) referred to the carbon paper as 555/250 and 444/250.)

In connection with the defense, the only explanation made by Respondent Pinkwater was that he knew Mr. DeRose; that he was no longer with him; that he had quite a few returns and complaints with respect to his sales and he did not want to accept any more of his orders. DeRose was with Mr. Pinkwater from approximately 1966 through a part of 1968; that he did business under the name of Imperial Stationers under authorization granted to him by Mr. Pinkwater.

Miller R. Gardner, Vice President-General Manager of Radio New York Worldwide, Inc., New York, New York, testified (Tr. 494-508) that he received, in late January or February 1967, a phone call from a gentleman whose name he did not know, who said he was with Imperial Stationers. The caller claimed that he had been referred to the witness by the Secretary-Treasurer of the witness' parent corporation. H said that his father had passed away and left him an office supply business; that he was in the service and was being shipped to Vietnam; that he wanted to liquidate, close off, all his father's affairs before he left; that he had some odds and ends, which included a few boxes of paper clips, pencils, pens, Scotch tape and carbon paper. When the witness asked the amount involved, he was informed it would be around $200. The witness said that he normally did not buy these supplies but that he would check with some of his people who usually did it. In a subsequent phone call the witness agreed that they would take the merchandise off his hands. The merchandise was received, the package opened, and then taken to the stockroom with instructions to leave it alone. Subsequent thereto an invoice was received from Imperial Stationers, 437 West 218th Street, New York, N. Y., dated March 2, 1967, in the amount of $947.90 (CX 237). On September 12, 1967, Imperial Stationers, by D. L. Fried (the name employed by Daniel L. Friedman, Comptroller of Star Office), wrote a letter to Radio New York Worldwide, Inc., requesting payment of the invoice of 3/2/67, in the amount of $947.90 (CX 239). On September 15, 1967, in response to the foregoing letter, a letter was written by Richard W. Grefe, Vice President, to Imperial Stationers stating that they did not have a record of having ordered this merchandise and asked that they call and pick it up. The merchandise, with the exception of a portion that had been inadvertently used, was returned. A credit memorandum in the amount of $866.64 (CX 241) was issued and the balance of $81.26 was paid to Imperial on October 16, 1967.

Respondent Pinkwater in his defense did not attempt to explain the foregoing testimony.

Andrew Levandoski, currently employed at Anco Industries, Riverton, New Jersey, prior to present employment was Director of Purchasing of Measurement Control Devices, Philadelphia, Pennsylvania, testified (Tr. 666-679) that while in the employ of Measurement Control Devices, on November 28, 1967, per instructions received rom corporate officials, he issued a written purchase order on behalf of his company to Wald Supply Company 5106 Broadway, New York, N. Y. (CX 307). The items listed in the order are as follows:

> "1 gross Yellow Pads—Letter & Legal Size
> 3 gross Pencils #2—Stratford
> 36 boxes Carbon Paper—Chiffon 250-555 (100 per Box)
> 2 Dozen Lindy Marking Pencils (Red & Black)"

Wald made a shipment of merchandise on March 7, 1967 (CX 308), shipping two gross of yellow pads in lieu of the one gross ordered and two gross of the Lindy markers in lieu of the two dozen ordered and 36 boxes of carbon paper containing 250 sheets per box, although the purchase order spelled out 36 boxes of carbon paper, 100 pieces per box. In directing his attention to the word and figures "Chiffon 250-555" used in the order, the witness was asked what was meant by this. He replied, "I assumed it was the supplier's designation for that particular brand of carbon paper; a stock number, for instance" (Tr. 675). He stated that the purchase order sent to Wald would have totaled $183 and that the amount that was shipped was approximately $460 worth. Thirty boxes, each containing 250 sheets per box, were returned to the shipper but the other unordered merchandise was retained. After taking credit for the returned paper, the check was sent to Wald which they accepted without complaint.

In connection with his defense, Respondent Pinkwater did not make any attempt to explain the foregoing testimony.

Ralph O. Smith, Purchasing Agent of Northeast Utilities Service Company, Burlington, Connecticut, which is a holding company performing purchasing functions for a number of operating companies, including the Connecticut Light and Power Company of Berlin, Connecticut, testified (Tr. 655-665) that on July 10, 1967, Imperial Stationers, 437 West 218th Street, New York, N. Y., wrote to Connecticut Light and Power Company, Berlin, Connecticut, a dunning letter (signed by D. L. Fried) with reference to an invoice dated February 13, 1967, in the amount of $1,151.64 (CX 507). On July 14, 1967 (CX 508), the witness wrote a letter to Imperial acknowledging receipt of the foregoing letter and stating that they were unable to locate either the invoice or the material. On July 18, 1967, Imperial Stationers replied by letter, signed by L. J. Witte, in which they enclosed a copy of the invoice, stating they were trying to secure a signed proof of delivery from the freight company, and as soon as it was received it would be forwarded (CX 509). On August 1, 1967 (CX 510), Imperial by a letter signed by L. J. Witte, submitted a signed proof of delivery. On August 8, 1967 (CX 511), the witness addressed a letter to Imperial Stationers acknowledging receipt of the letter of August 1st and stated that they had located the material but it was an unsolicited order; they were not interested in retaining this material and asked for return shipping instructions. Thereafter the witness received a phone call from a Mr. William Frankel who said he was the accountant for the firm of Imperial and that the material had been sent at the direction of Mr. Charles Derek. The caller was told Derek was an employee of one of the operating companies and had no authority to request this material. On August 14, 1967 (CX 512), the witness addressed a letter to Imperial, attention Mr. William Frankel, stating that following the telephone conversation he had investigated the material they were holding and that it was not the quality they wished to use regardless of the offer to reduce the invoice price. Shipping instructions for the return of the unsolicited order were requested. On August 17, 1967 (CX 513), a letter by Imperial authorized the return of merchandise which could not be used; however, it asked that they retain a portion of the merchandise for use in the next few months. On August 22, 1967, all of the merchandise was returned to Imperial. Since this return there has never been any further correspondence between the parties or any further demands.

Respondent Pinkwater, in his defense testimony, made no attempt to explain the foregoing testimony.

Henry A. Goodman, Manufacturer's Representative in the electronic field, operating from his home in Philadelphia, Pennsylvania, testified (Tr. 459-485) that in March or April 1967, he was contacted by telephone by a man whose name he does not remember, who was with the Pioneer Supply Company. This man told the witness that he had been referred by one of the witness' principals, Mr. Ben Jacobs, the vice president in charge of sales at Telefunken; that he had taken a position with Voice of America in Europe and that he was liquidating a stationery business located in New York. The witness said he was a little annoyed that his boss, Ben Jacobs, would suggest that he get rid of stationery; that he knew "where to sell electronic components, but surely not stationery" (Tr. 462). The witness told the caller: "'If I am supposed to get rid of this stuff for you, you better make the price attractive enough so that somebody can make a profit on it if I turn it over to them, and I do not want to be billed for this, regardless of what Ben Jacobs told you, and I don't want it in here collect. It has to come in freight prepaid'" (Tr. 462-63). Subsequently, on notice from the freight company, he picked up a package at their terminal in Philadelphia, and drove home and put it in his basement. He opened it up and said he had never seen so many pens or carbon paper in his life outside of a retail store. He waited for an invoice which never arrived. The record shows that the shipper was Pioneer Supply Company, 437 West 218th Street, New York, N. Y., and that it shipped the merchandise to the witness on March 10, 1967 (CX 252).

Goodman went to a neighborhood stationer and related what was involved, but the stationer was not interested in taking it off the witness' hands. When asked if anyone ever used the stationery, he said he had a son who was the president of his fraternity at Temple University. "My son liberated the fountain pens. * * * [He] took it down to his fraternity house and they used this as a promotion for their fraternity. He reduced the eight gross of pens to approximately thirty-two dozen" (Tr. 467). The witness never received an itemized bill. On August 21, 1967, he received a letter addressed to him from Pioneer Supply Co., bearing the signature D. L. Fried (CX 254), dunning him in the amount of $441.29. On October 3, 1967, and October 30, 1967, he again received similar letters from Pioneer Supply Company, again signed by D. L. Fried (CX 255, 256). He stated that he did not respond to any of these letters. On November 17, 1967, he received a letter from Jacob P. Lefkowitz, by Robert S. Schneider (CX 257), stating that he was the attorney for Pioneer and unless the payment of $441.29 was received within ten days that he was instructed by his client to proceed with legal action. He phoned Mr. Lefkowitz and said, in part, "I read him a letter and I told him I thought he was involved in something which to me sounded a little bit shady" (Tr. 469). The next thing he heard was from Pioneer Supply Company telling him that if he wished to return the merchandise this letter woud serve as authorization (CX 258). On January 25, April 8, and May 7, 1968, he received letters from Pioneer signed by L. J. Witte stating that they had not received the return of the merchandise and requesting his attention to the matter (CX 520, 521-A, 522). There had been shipped to Goodman eight gross of pens and 36 boxes of carbon paper; and on April 24, 1968, 32 dozen pens and all of the carbon paper were returned to Pioneer.

In his defense, Respondent Pinkwater had nothing to say concerning this testimony.

Wiliam S. Jeffries, Administrative Partner of Alex Brown & Sons, Baltimore, Maryland, testified (Tr. 549-566) that he took a phone call from a lady who gave the name of Mrs. Roberta Lee, who identified herself as a customer and a friend of his partner in Winston-Salem, North Carolina, James E. Homes, Jr. She said that her husband had been killed in Vietnam and that she was being forced to liquidate his business, about which she knew nothing, and solicited his help through the purchase of certain supplies that she needed to liquidate in order to satisfy debts of her husband. The witness stated: "Well, since the introduction and relationship claimed was what it was. I was stimulated to check with our general services department to see about our needs and to give certain orders to this person for delivery to us, which I did" (Tr. 552). The amount of the order given, which consisted of carbon paper and pens, was in the neighborhood of $890 (Tr. 552). The ordered goods were shipped by Wald Office Supply Company, 437 West 218th Street, New York, N. Y., on April 18, 1967 (CX 464, 465); and, upon receipt by Alex Brown & Sons, it was not opened. A letter written to Wald Office Supply Company stated, in part:

> "The material described in your invoice under date of April 14, 1967, has been received by us and is being returned immediately. The unusual circumstances under which an order for this material was solicited and the lack of information with respect to prices and quality of material require this action."
>
> * * * * *
>
> "We are, of course, returning the material at our expense and trust that you will understand that we do not routinely purchase material under these circumstances" (CX 524).

The merchandise was returned to Wald Supply Company and Alex Brown & Sons did not receive any further communication or demand for payment.

In connection with his defense, Respondent Pinkwater did not comment with reference to the foregoing testimony.

William E. Cox, Assistant Treasurer, Quaker City Paper Company, Inc., Philadelphia, Pennsylvania, testified (Tr. 509-517) that in September 1967 he received a call from a woman who asked for Mr. Thomas, who was the witness' predecessor. The woman said Mr. Thomas had told her to call back in six months to reorder stationery supplies. He replied he didn't know anything about it but he would check into it. The lady said she would call back. She stated she represented the York Supply Company. The witness contacted Mr. Thomas, who informed him that he had never placed an order with York Supply Company. On October 2, 1967, York Supply Company, 437 West 218th Street, New York, N. Y., shipped to Quaker City Paper a large box of stationery, incuding pens, carbon paper and notebooks. After the merchandise was received the lady called again and inquired if he had received the stationery. She was told that it had been received and that she wasn't authorized to send it; that instructions had already been given to the Quaker City shipping department to have it returned. On October 26, 1967, a letter was written to York Supply Co. by Quaker City stating that they were returning, under separate cover, freight collect, a shipment of supplies that had been sent to them and that the firm had not placed any order for these supplies (CX 260). He was contacted by this woman again, after the merchandise had been returned, and she asked if he had received a watch that she had sent to him as a gift. He informed her that he had not and in the conversation he stated that he had been contacted by the Federal Trade Commission and that they had inquired as to her practices. He was never at any time billed by York Supply.

In his testimony, Respondent Pinkwater had no comment with reference to the foregoing testimony.

Lawrence E. Thomas, an employee in the Accounting Department of Quaker City Paper Company, Philadelphia, Pennsylvania, testified (Tr. 606-610) that he was contacted in May 1967 by a woman who identified herself as representing York Supply Company (Tr. 607). She told the witness that his office in New York City had referred her to him and asked the witness to help her in liquidating the business (Tr. 607). The witness agreed to help and placed an order (Tr. 607). The witness left Quaker City Paper Company in July of 1967 and returned to their employ six months later. During this period he was replaced by William E. Cox (above) (Tr. 606, 608). The witness received a telephone call from Mr. Cox in September of 1967 asking him if he "had agreed to reorder supplies from York Supply Company six months after the original transaction", and the witness said that he "had not agreed to any such thing" (Tr. 608).

Respondent Pinkwater had no comment with reference to the foregoing testimony.

Brother Patrick Walsh, Principal of Notre Dame High School of West Haven, Connecticut, testified (Tr. 578-586) that he received a phone call, sometime in September or October 1967, from a man who said he was calling from California; that one of his relatives had died in New York and that he owned a store and it was necessary to get rid of merchandise and asked if the witness would help him out. In the midst of the conversation he said that the witness had been recommended to him by a Father Kenna (the Midwest Provincial of Holy Cross priests). The witness told the caller that he didn't know whether or not he would be able to get rid of the supplies and directed that they be sent to him. Some merchandise was sent to him by the Mid-East Supply Company, 437 West 218th Street, New York, N. Y., and he received an invoice from that company dated 10/23/67 in the amount of $708.48 (CX 300). On November 6, 1967, Brother Walsh addressed a letter to the General Manager, Mid-East Supply Co., 437 West 218th Street, New York, N. Y., Re: Invoice 9860, as follows:

> "I gave no written authorization for the above order. I am appalled that any reputable company would conduct business in such a manner. I do not believe that there is either a legal or moral obligation on

> my part in regard to this order. It is my intention to investigate the matter further.
>
> "The entire order has been set aside. If you desire the materials sent, I would suggest that you make the necessary arrangements to have the material picked up" (CX 301).

Mid-East Suppy Co., by letter signed A. Kay, on November 22, 1967, wrote Brother Patrick Walsh and acknowledged receipt of his letter of November 6 (CX 303), urged him to keep any of the items that he felt he could use and pay for him when the invoice was due, and stated that the letter was an authorization for any items which he wished to return. They closed by saying that they regretted the misunderstanding involved and wished to thank him for his cooperation (CX 303). On November 28, 1967, Mid-East, by L. J. Witte, responded and said, in part, that they were completely unaware that it was not a bona fide order and asked him to look over the merchandise and give consideration to retaining some of the goods. All the merchandise was returned and since that time the witness has not been billed nor has he made any payments.

Respondent Pinkwater, in connection with his defense, had no comment with reference to the foregoing testimony.

Philip Cribben, Assistant Director of Purchases of the Penn Mutual Life Insurance Company, Philadelphia, Pennsylvania, testified (Tr. 485-493) that in September 1967 he was told by some of the management members of the corporation that he would receive a call from a Mr. J. M. Jackson, and he was instructed to purchase stationery supplies from him. He received a phone call from Mr. Jackson who told him that he was liquidating an estate; that he offered certain merchandise for sale; and that he placed an order for 50 gross of Blaisdell ball-point pens. The merchandise was received from Century Supply Company, 437 West 218th Street, New York, N. Y., and Penn Mutual received an invoice dated September 22, 1967, for 50 gross pens at $18.79 or a total of $939.50, which was paid by Penn Mutual (CX 334). He testified that Century Supply Company attempted to solicit more orders through Mr. Jackson, or other individuals, but no orders were given.

With respect to the testimony of Mr. Crilfben, Respondent Pinkwater stated that he had never met or known an individual known as J., M. Jackson and that he didn't have anyone selling under Century Supply by that name (Tr. 1289).

Dorothy Feldman, Secretary and Office Manager of C. E. Snow Company, Ambler, Pennsylvania, testified (Tr. 680-705) that, at the time of the transaction in question this office was located in Philadelphia; and that the C. E. Snow Co. has offices in Maryland and Fort Lauderdale. The partners of C. E. Snow Co. are Mr. Rubin, who is located at the Pennsylvania office, and Mr. Charles Edward Snow, who is located in the Maryland office. The witness works in the Ambler, Pa., office (Tr. 681). In October or November 1967, the witness received an unordered shipment of writing pens from the Pioneer Supply Company (Tr. 682-83). The shipment contained ten to 15 gross of pens (Tr. 683). An invoice for the pens was subsequently received from Pioneer Supply Co. (Tr. 684). The witness testified that she purchases the office supplies for the Pennsylvania office and that Mr. Snow never purchased office supplies for her office (Tr. 682). On cross-examination, the witness stated that she asked Mr. Rubin if he or Mr. Snow had placed an order for the pens and he said that they hadn't (Tr. 697). The witness then returned the shipment to Pioneer Supply Co. The witness subsequently received a call from a person who identified himself as representing Pioneer Supply Co. and he told her that he could not take the shipment back and that she must accept it (Tr. 685-86). The shipment was returned to the witness' office and she again returned the shipment to Pioneer (Tr. 687). The witness stated that her office normally uses approximately 50 pens a year (Tr. 684).

In connection with his defense, Respondent Pinkwater had no comment with reference to the foregoing transaction.

Myra Nierenberg, Purchasing Secretary, Reynolds Fasteners, Long Island, New York, testified (Tr. 416-424) that she received a telephone call on or about December 12, 1967, from a woman who identified herself as Mrs. John Patterson of the Roman Company. She said her husband had died and she couldn't afford to keep up the business. She had to sell out whatever supplies she had on hand. She asked the witness to buy as much as she could.

On December 13, 1967, the witness issued a purchasing order on behalf of Reynolds Fasteners, Inc. to Mrs. Patterson, care of Roman, P.O. 236, Forest Hills, New York, "confirming verbal order 12/13/67" for legal pads, pencils, some pens, and the total amount of $12.44. See CX 310. Although she only ordered two dozen pencils, she received six dozen. She also received some "Ko-Rec-Typ", which she had not ordered. The invoice shipped by Roman Company, 437 West 218th Street, New York, N. Y., shown by an invoice dated 12/22/67, totaled $17.83, plus 36 cents tax, or a grand total of $18.19 (CX 311). The merchandise that was shipped was retained and paid for. The address "care of Roman, P.O. Box 236, Forest Hills, N. Y." was given by Mrs. Patterson during the conversation.

Respondent Pinkwater with respect to the foregoing testimony said he did not know a Mrs. John Patterson and had never heard of such a person, nor did he know if such a person was selling for the Roman Co. (Tr. 1286).

Roger Holden, Vice President and Treasurer of Joseph Horne Company of Pittsburgh, Pennsylvania, testified (Tr. 1180-1194, 1200-1204) that on December 26, 1967, he received a telephone call from a person who said her name was Roberta Hall. She said "her husband had passed away and that he had been a friend of Mr. Seiler's, who was the Chairman of the Board of Associated Dry Goods Corporation which is the company that owns Joseph Horne Company, and she said that Mr. Seiler had suggested that she call me because we use the kind of supplies and she had the inventory of the company which her husband had operated and she was trying to close out, she was trying to get rid of this inventory and that she had some rather attractive prices on the merchandise, and wondered if there was anything that we could use. I asked her what kind of inventory she was talking about and she mentioned typewriter ribbons and pencils and ball point pens and that sort of think. I said that I would be glad to have our Purchasing Agent discuss the matter with her, and if she said the supplies were competitively priced, we would be happy to work with her, buy some of her inventory." On December 26, 1967, Joseph Horne Company, issued a purchasing order to York Supply Company, 437 W. 218th St., Riverdale, N. Y. for some supplies totaling $175.03, "confirming Roberta Hall" (CX 324). On December 30, 1967, a copy of the order was sent to Mr. Seiler with the following notation thereon: "Mr. Seiler, Mrs. Hall called as you suggested. Our people were glad to help and I understand she was pleased. Rog Holden." Shortly thereafter the witness received a telephone call from Mr. Goggin apparently in Mr. Seiler's office, saying that Mr. Seiler did not know Mrs. Hall, requested that everything be done to stop the shipment, and see to it that the merchandise was not purchased. On January 4, 1968, Joseph Horne Company issued a cancellation notice to York Supply Company (CX 325). On January 11, 1968, Pioneer Credit Co. wrote to Horne as follows:

"We have today received your cancellation notice #25154, directed to the York Supply Company.

We are writing this letter in their behalf for we have factored this account, and have all the papers relative to this transaction on hand. In fact, upon looking into this further see that this goods was shipped out to you on January 5th, and inasmuch as this was a bona fide order, for we have your Purchase Order #E3137, we have paid this firm out on this transaction.

In view of the fact that this shipment is already in transit to you, we ask that you do accept and retain it when it arrives at your premises.

Thank you for your kind cooperation.

Very truly yours,

PIONEER CREDIT CO.

(s) L Lowe
L. Lowe"
(CX 326)

LL/ek

The Horne Company refused to accept delivery of the shipment. Subsequently, the Horne Company never received any communications from York or Pioneer Credit Co.

With respect to the testimony of Mr. Holden, in connection with his defense, Respondent Pinkwater said that he did not know a Roberta Hall (Tr. 1289).

David R. Hofe, Materials Manager, of a Division of General Kinetics, Johnstown, Pa., which employment he has had since February 24, 1967 (prior thereto he was the Purchasing Agent for Allo Precision Metals Engineering, Rockville, Md.), testified (Tr. 567-578) that he received a call from Mr. Charles Bartz of the Allo Precision Metals Company informing him that they were in receipt of a shipment of supplies addressed to the attention of the witness. The witness informed Mr. Bartz that he had not ordered the shipment but since his name had been used he requested that the shipment and the packing list be forwarded to him at Johnstown, Pa. The shipment had been made by Roman Company, 437 West 218th St., New York City, to Allo Precision Metals on March 18, 1968, attention D. R. Hofe (CX 502). An invoice, bearing the date 3/21/68, from Roman Co. to Allo was in the amount of $73.20 (CX 503). On April 25, 1968, he attempted to reach Roman Co. by phone but was informed by the operator that they had no listing for such a company in New York City. He asked if they had a listing for a concern at the address of 437 West 218th St., New York, N. Y., and he was informed that there was a listing for Imperial Stationers. The operator gave him the number and the witness telephoned; the party who answered the telephone when asked if this was the Roman Co. replied "No, this is not the Roman Company, however, they are located in the same building with us. I can transfer you" (Tr. 570). He was transferred to a Mrs. Witte, pronounced Wit. (Apparently this was Mrs. Wittenstein who uses the name Witte.) He identified himself to Mrs. Witte and stated that he was in receipt of supplies shipped to Allo Precision Metals in Rockville, Md., and asked who had placed the order. She said a Mr. D. R. Hofe. The witness informed her that he was D. R. Hofe and that he was no longer associated with Allo Precision Metals. She then checked some records and said, "I'm sorry, but Mr. Hofe did order this" (Tr. 572). He again informed her that he had not and that he was going to return the supplies at their expense. The merchandise was returned and apparently accepted by Roman Co.

Respondent Pinkwater testified with respect to the testimony of Mr. Hofe that he never heard of a Mrs. White of the Roman Co.; he didn't know if she was a salesman, and that she was possibly an employee of a jobber that sold under Roman (Tr. 1283).

Helen B. Keller, Secretary and Office Manager of Republic Mortgage Company, Philadelphia, Pa., testified (Tr. 531-546) that during April or May 1967 a woman whose name she could not give, phoned her and told her that the Mortgage Bankers Association had given her the name of the Republic Company; that her husband had died recently and she had a great number of office supplies she was trying to sell; that she was in a position to give the company a very good price on anything they could use (Tr. 533). A small order was given. At the time the witness gave the order she wrote down on a pad the items ordered so that they could be checked when the order came in. An invoice was issued by Pioneer Supply Company dated 5/28/67, in the amount of $171.30 (CX 247). After the two cartons of office supplies arrived, the witness tried to reach Pioneer Supply Company in New York by telephone but was informed there was no listing for the firm; so, on the same day, she wrote a letter, dated June 15, 1967 (CX 249-AB):

"Gentlemen:

"When your saleswoman called our office a number of weeks ago saying someone in the Mortgage Bankers Association had given her our number to call in an attempt to sell some of the stock of office supplies of her deceased husband, I at first did not want to order anything but after talking to her gave the following order:

2 boxes (12 pencils each) of #4 pencils
1 box " of #3 pencils
2 boxes " of #2 pencils

71

2 boxes of paper clips #1 Gem (2,000 clips)
2 boxes Swingline Staples #77
1 box Acco Fasteners #22 (50)
3 dozen canary pads
2 packages of Kor Rec Type.

"Several days ago two packages arrived from your company which contained:

3 GROSS #4 pencils
1 GROSS #3 pencils
2 GROSS #2 pencils
2M paper clips
20 BOXES Swingline staples
2 BOXES Kor Rec Type
1 BOX—500 Acco Fasteners
3 dozen canary pads

"Of the goods received, ONLY TWO ITEMS were in the correct amount. With four girls in the office, for instance, how do you think we can use or want to purchase 72 packages of Kor Rec Type? Then too, the staples do not fit nor work properly in our staple machines— so we cannot use the ones shipped. As to the pencils—your solicitor said we would get a very good price—while your bill indicates they are 5 cents a dozen less than we pay at Pomerantz here in Philadelphia, from whom we never order in GROSS LOTS.

"I tried to reach your offices by 'phone today, but New York information advises there is no listing for your firm. We most certainly are not going to pay—particularly $72.00 for Kor Rec Type, $32.40 for pencils which were not ordered nor $16.00 for staples we cannot use.

"Incidentally, I talked to the Mortgage Bankers Association's offices and have been advised NO ONE gave anyone in your organization names and addresses to call to attempt to sell your stock.

"I will appreciate receiving a reply from your company telling me just what you are going to do about the shipment!

Very truly yours,

(Mrs.) Helen B. Keller
Secretary" (CX 249-A-B)

On June 22, 1967, a reply was sent by Pioneer, reading as follows:

Dear Mrs. Keller:

"We have on hand your letter of the 15th and note your comments that you feel you have received an excess amount of merchandise.

"The party who handled this transaction is not available to review this with, but we can only assume that these particular items were brought up and he was under the impression that you requested that this merchandise in these quantities be forwarded out to you, but we certainly do not want you to keep any merchandise you feel you cannot possibly use.

"However, do try to check your stock and anticipate your needs for the next few months and retain that portion of the shipment which you can utilize.

"However, please do accept this as authorization to return to us the excess via a carrier other than Railway Express.

Very truly yours,

PIONEER SUPPLY COMPANY
L. J. Witte" (CX 250)

Republic Mortgage kept part of the merchandise and the balance was returned to Pioneer. On June 29, 1967, a check for the $40.10 was sent to Pioneer in satisfaction of the account. The respondents developed on cross-examination that Republic kept more merchandise than was actually ordered.

In his testimony, Respondent Pinkwater did not attempt to make any explanation of this transaction.

Patrick P. Rizzo, President of Astorlyn Corporation, Forest Hills, New York (Tr. 363-373), testified that in July 1967 he was contacted by a man on the telephone who said he was Dr. Campbell and he was with the Hanger Corporation. He stated that he was liquidating his business; that he was joining the Peace Corps. He had been in touch with Mr. Dickey of the Crown Controls Company of New Bremen, Ohio, and that Mr. Dickey had recommended that he, Dr. Campbell, call his (Rizzo's) firm in an effort to sell the supplies involved in the liquidation. After telling him that he was not interested, Dr. Campbell said, "Can I send you over a gross [of ballpoint pens]? If you like them, you can pay for them. If you don't like them, you can send them back" (Tr. 366). The witness said, "I am not ordering any pens from you. You can do what you want, but I don't want to accept any of your supplies." CX 313 is an invoice of Hanger Corporation, 251 West 30th Street, New York, N. Y., for shipment to

Crown Controls Company, Forest Hills, L. I., N. Y., attention Mr. Rizzo, for one gross All Star pens, medium blue, $41.76, sales tax $2.09, total $43.85. After the receipt of the pens, the witness said he called Mr. Dickey, Crown Controls Co., and familiarized him with the transaction which took place between himself and Dr. Campbell. He asked Mr. Dickey if he had recommended anyone to contact his company to sell stationery supplies in the liquidation of a company. Mr. Dickey said he had not recommended anyone to contact him. Following that, the ball point pens were returned to the shipper.

With respect to Mr. Rizzo's testimony, the only explanation Respondent Pinkwater had to make was that he did not know Dr. Campbell and had never heard of him (Tr. 1279-80).

Complaint counsel were unsuccessful in an attempt to obtain the appearance, through subpoena, of a Mr. John Rowe to explain a transaction between Boscul Coffee & Tea, Inc. of Camden, New Jersey, and Office Systems, Inc. However, there were received in evidence documents obtained from respondents' files which are self-explanatory. On July 16, 1965, Lefkowitz & Brownstein wrote the following letter:

> "Please be advised that we are the attorneys for Pioneer Credit Co., assignees for Office Systems, Inc., of Long Island City, New York.
>
> Our client advises us that there is presently due and owing to it the sum of $3,818.88, for merchandise sold and delivered as per its invoice No. 1741 dated January 22nd, 1965.
>
> Demand is hereby made upon you for the sum of $3,818.88.

In the event payment of this sum is not received within ten days from date, we are instructed by our client to proceed against you with legal action without further notice.

Very truly yours,

James M. LaRossa"
(CX 30)

A response to said attorneys was made in a letter dated July 19, 1965:

"Gentlemen:

"Please be advised that our purchase orders #3181 and #3182 under date of November 4, 1964, covering purchase of various merchandise were invoiced by Office Systems, Inc., invoice number 768 and dated November 12, 1964. This merchandise was received and paid for by our check number D-1702 dated January 4, 1965.

"On January 27, 1965, we received various merchandise from Office Systems, Inc. which we did not order. We were invoiced by Office Systems, Inc. invoice number 1741 dated January 22, 1965, for this merchandise in the amount of $3,818.88. Various attempts have been made to contact Office Systems, Inc. in order to return this merchandise.

"On February 9, 1965, we were able to contact a Mr. Skyler who stated that Office Systems, Inc. could not accept the merchandise and that we could pay for it as we used it. We stated that we could not use the merchandise and wanted to return it. Mr. Skyler further stated that Office Systems, Inc. did not have storage space available for the merchandise and would not accept its return.

"On June 17, 1965, we received a statement of account from Pioneer Credit Company pertaining to Office Systems in the amount of $3,818.88.

"On June 22, 1965, a Mr. Pine of Pioneer Credit Company called regarding the statement. After explaining the above situation we were referred to Mr. Daniels who was unaware of the above situation. On June 22, 1965, a Mr. Lang called regarding the above situation and said that we would hear from his attorneys.

"In view of the above, we have been warehousing Office System, Inc. merchandise since January 27, 1965, for which expense we have not been reimbursed. We cannot continue to warehouse this merchandise at our expense. We have attempted to return this merchandise which will not be accepted by Office Systems, Inc. We are therefore forced to charge a warehousing expense to Office Systems, Inc. if the merchandise cannot be returned prior to July 31, 1965.

"If you desire any further information pertaining to the above situation, please contact Mr. Edward J. Bradley, Attorney at Law, 1702 Finance Bldg., 1428 South Penn Square, Philadelphia, Pa. 19101.

Very truly yours,

BOSCUL COFFEE & TEA, INC.
John A. Rowe
Controller" (CX 31-A-B)

On August 20, 1965, Pioneer Credit Company, by L. J. Witte, wrote to Boscul as follows:

"We are writing to you with reference to merchandise sold to you under invoice 1741 by Office Systems.

> Should you still feel that you cannot utilize this goods please accept this as authorization to return this merchandise to us here as we believe we will be able to secure a local supplier for this goods. We ask that you please send this merchandise back to us via a trucker other than Railway Express Agency.
>
> And, as we do wish to reduce our loss on this transaction as best as we can we would greatly appreciate your returning the gift sent to you as well.
>
> Thank you very much.
>
> Very truly yours,
>
> PIONEER CREDIT COMPANY
> (s) L J Witte
> L. J. WTTE". (CX 32)

Respondent Pinkwater had no explanation of this transaction.

Thomas L. Tasso, Manager of Purchasing at Stanford Research Institute, Menlo Park, California, testified (Tr. 1119-1162) that during May 1967 shipments were made by Imperial Stationers to Stanford's Washington, D.C. office and the invoice tendered (CX 487, 489) was thereafter protested by him (Tr. 1126). After checking through Dun and Bradstreet, he tried to reach Mr. Frankel by telephone. Eventually (November or December 1967, see Tr. 1155), he reached Mr. Pinkwater and voiced objection to orders secured from two of their offices under false pretenses (Tr. 1127), claims that they were closing out stock, and that the salesman had a connection with the president of his firm (Tr. 1151). He complained they were "conned into a large purchase" (Tr. 1130, 1147). Pinkwater did not deny the complaint, but merely claimed he had nothing to do with the transaction but had merely bought the account (Tr. 1131, 1147, 1154) and that the salesman (Frankel) was no longer with the firm (Tr. 1152). After Tasso objected to the subterfuge used to induce the orders, Pinkwater caught him off guard by asking what he was willing to pay. Tasso stated he would call back (Tr. 1133). An exchange of correspondence recounted certain aspects of the transactions and conversation (CX 495-497; Tr. 1128). By letter of 3/11/68, Mr. Pinkwater, pressing for a settlement in excess of Mr. Tasso's offer, recounted his position that he had only taken over the account (CX 498). Tasso's response reiterated his position that a lesser figure should be settled upon (CX 499). Eventually materials still on hand were shipped back but a check for $350 was accepted for the used merchandise (Tr. 1153).

Katherine Hagan, shopper for the Better Business Bureau, New York, N. Y., testified (Tr. 265-295) that she called upon the Hanger Company, 251 West 30th Street, New York, N. Y., in November 1967, and spoke to Mr. Curtis (Tr. 265, 266). She was given an advertisement by the Better Business Bureau having to do with telephone solicitors offered $100 per week and a five percent commission. She was told to shop like anyone applying for a job (Tr. 269). She described the premises as having seven or eight small cubicles with phones and desks (Tr. 268). She gave Curtis her background in selling (Tr. 269). Mr. Curtis told her the job paid $100 a week, provided she sold a thousand dollars worth of merchandise (Tr. 270). Curtis described the cards which they used, containing the firm's address, telephone number and the name of the president of the company, and at the bottom of the card another company's name, and the name of its president. She was told she was to use a distress story, such as: she had just inherited the business, was a widow, and didn't know anything about it, and wanted to unload it (Tr. 270).

Witness Hagan further testified that she was told by Curtis never to give her own number for the man to call back, but she was to try to get to the president immediately and to sell him and to get off the phone. If it is a large company, she was to try to sell between $700 and $800 worth of pens and markers, and if it is small, $400 or $500 worth. Curtis explained: "We try to load them up for about four or five years, so that it is a one-shop operation" (Tr. 271), and that you always use a distress story (Tr. 273). As to the person's name used as a reference, she was to state, if pressed: "No, no, I don't know him, but he is a friend of my family" (Tr. 273). Curtis mentioned another girl who was an actress and who did well, because she was so believable, that she was all distressed and had this business for sale, and the like. "You can say that you are just a widow and that you have this business. You don't know anything about it, and that you wanted to sell these things" (Tr. 274); that if they know the reference name personally, don't get involved, say he is a friend of the family "get off that subject entirely. Then go into your pitch . . . assume the sale . . . I can send you so much . . . The minute you get any kind of confirmation on it, get off the phone . . . We will write up the sale and take care of it . . . We don't call back" (Tr. 275). During her interview, one of the men from another cubicle came out for more cards and Mr. Curtis explained that they are valuable, but she would be given more as she needed them. She heard one of the men state he had just been drafted into the Army and had a small stationery business (Tr. 276); that "he needed to wind up his affairs before going into the service of his country, and could this man please help him" (Tr. 277).

Curtis also explained to her that in order to get the five percent commission she had to sell over $2,000 worth (Tr. 278). While she was there, Curtis made a sample phone call to explain how it was done, and when he reached the secretary of the prospect firm, he stated that the name on the bottom of the card was a friend of his and suggested that he call the president of the company as at the top of the card, and he then stated: "I have just come over here from Hungary . . . I want to liquidate this business" (Tr. 279). Curtis thereafter agreed to hire her but when she didn't return at the appointed time he called her at her home (Tr. 280). When she told him she didn't think it was fair that she would have to sell $2,000 worth a week to get the five percent commission, Curtis expressed annoyance, and stated she had held him up from hiring other people (Tr. 281).

On cross-examination, Miss Hagan testified that Curtis had shown her a few cards bearing the name of a company, its address and the president's name, and the reference name Curtis stated to be used in the call (Tr. 288). She testified that, according to Curtis' instructions, it was to be a distress sale pitch (Tr. 291). She reiterated Curtis' instructions that larger firms should get a bigger order "because we won't be calling again and we will load him up for three or four years". Curtis told her he would let her know after two or three days' trial if she was a good enough actress to put the story over; ". . . I could be a widow or I could use whatever type of distress story I wanted . . ."; that one man said he was going to into the Army. That's what he uses (Tr. 292). Curtis suggested that she state she was a widow and knew nothing about the business and wanted to unload it, "Could they please help me by taking these few things" (Tr. 293).

Bruce Kahn, President of George Kahn Company, New York, N. Y., testified (Tr. 595-605) that he sells pens and writing instruments (Tr. 595) through telephone solicitors for whom he advertises periodically in the "New York Times". During the fall of 1967, while checking one such ad placed by his firm, Mr. Kahn saw an advertisement immediately above his calling for telephone solicitors for similar merchandise. He called the telephone number shown and made an appointment to visit business premises in the vicinity of 200 or 250 West 30th Street; he was not sure of its exact address (Tr. 596). He recalled, however, that the name on the door was Hanger Supply and that the man he spoke to was Mr. Varadi. Varadi showed him some pens, carbon paper, and the like, and told him how they sell it. Varadi explained that they make a certain number of long distance calls each day to business people throughout the country, utilizing cards which show the name of the business firm and an individual's name and, in the lower corner, the name of another individual to be used as a reference. Varadi then said to the witness:

> "You call the company up and tell him that this person in the lower corner of the card gave you their name and that you are either liquidating a business or somebody went to Viet Nam or some such basis, and can he help you out. You are closing out your stock and you will give him a good price on the various items which you have, such as carbon paper . . . At that point, you sell a load of stuff. * * * You tell him you will ship X number of boxes of carbon paper, for example, but you don't tell them you are packing 200 or 300, whatever it is, to the box, a larger quantity than is customarily shipped . . ." (Tr. 598-99).

Witness Kahn further testified that Varadi showed him sizeable orders, of up to a thousand dollars, which merely showed the number of boxes of carbon paper but didn't indicate the quantity to the box (Tr. 599). "We pack them differently than what they customarily get; in larger quantities" (Tr. 601). On cross-examination, the witness was asked if his business would stand to benefit if his competitor was adversely affected by his testimony and his response was: "I would say our business could be materially hurt if misrepresentations were made" (Tr. 603). When asked whether he had any intention of being hired (when he responded to Hanger's ad), he responded that he went over to find out what type of operation they were running; that he wouldn't be affiliated with such a company (Tr. 604); and that up to that time he never even knew of the existence of that company (Tr. 604).

Although the testimony of Everette M. Russell, Assistant Cashier of the New England Merchants National Bank of Boston, Massachusetts, has been disregarded, there is set forth below an exchange of letters between the Bank, Pioneer Supply Co., and Pioneer Credit Co., which were received in evidence and are self-explanatory:

"April 17, 1963

Pioneer Supply Company
30-15 35th Avenue
Long Island City 6, New York

Gentlemen:

On March 26, 1963, we issued our Purchase Order #38013 to Enzo diMola and Teddy, for 500 boxes of Swingline Standard Staples, 1440 pads of white with blue lines—8½ x 11", and 1440 pads of yellow with blue lines—8½ x 11". Today, we have received your invoice #002789, dated April 3, 1963 in the amount of $1,028.70. It now appears that there was a complete lack of understanding between our bank and the gentlemen to whom we gave the order. So that they might liquidate their stock, the prices were based on an offer to sell to us the above items at a cost less than we had been paying our regular vendors.

The 1440 white pads at 18¢ per pad delivered to us, contained 50 sheets each. From our regular vendor, we had been receiving 100 sheets in each pad. Therefore, we have received exactly one-half of what we anticipated.

The 1440 yellow pads contain 50 sheets, and this is the same as we have been receiving. However, because of a further misunderstanding, the price of 35¢ per pad is ridiculously high. We can purchase these pads in Boston at 13¢ each.

Under these circumstances, you will understand that we do not feel that we should pay your invoice in its present amount. Perhaps, you would like to have the 20 gross of pads picked up for return to you, or if you prefer to send us an adjusted invoice at a price of 9¢ per pad for the white and 13¢ per pad for the yellow, we shall be glad to send you our check.

Will you kindly let us hear from you at your earliest convenience.

Very truly yours,

E. M. Russel
Assistant Cashier and
Purchasing Agent" (CX 358)

EMR/jsl

"April 23, 1963

New England Merchants National Bank
Boston, Mass.

Re: Pioneer Supply Co.

Dear Mr. Russell:

We received your letter addressed to Pioneer Supply Co. inasmuch as they have suspended all operations and we have taken over their accounts receivable.

We regret any misunderstanding that might have occurred here. However, we are sure that the prices quoted by Enzio DeMola and Teddy for both the white pads and yellow pads were predicated on each pad containing 50 sheets, inasmuch as this was the only merchandise they had in stock. Also, the prices of 18¢ and 35¢ are really reasonable ones for this quality merchandise.

However, since the warehouse here is closed, and we wish to cooperate as best we can, we will permit you an overall 10% adjustment on these two items. Same amounts to $76.32, which represents a considerable saving.

We trust you understand our position in this matter and are taking the liberty of enclosing our credit memo covering the above adjustment.

Thank you for your kind consideration and cooperation.

Sincerely

PIONEER CREDIT CO.
/s/ H. Pine
H. Pine" (CX 359)

"April 30, 1963

Pioneer Credit Company
30-15 35th Avenue
Long Island City 6, New York

Attention: Mr. H. Pine

RE: Our Purchase Order #38013 to Enzo diMola
and Teddy

Dear Mr. Pine:

Thank you for your letter of April 23, 1963, enclosing credit of $76.32 for application to our above mentioned purchase order. We can not agree with you that the prices are reasonable, even taking into consideration your 10 per cent credit. Whether or not, the vendors' prices were predicated on 50 sheets to a pad, the fact remains that we have in evidence our regular pads containing 100 sheets, and this is what we were talking about. As to the other pads, we repeat, that there was a definite misunderstanding as to what we were purchasing. As we told you in our letter of April 17, 1963, we are willing to pay 9 cents per pad for the white and 13 cents per pad for the yellow, or at your request, we will ship the whole order back to you.

As another alternative, perhaps, you would prefer to turn back this particular account receivable to the principals to whom we issued our purchase order.

Very truly yours,

E. M. Russel
Assistant Cashier and
Purchasing Agent" (CX 361)

"May 2, 1963

New England Merchants National Bank
Boston, Massachusetts

Dear Mr. Russell:

Thank you for your recent letter.

Although we would like to cooperate as best we can, frankly it would be impossible for us to reduce the prices on the pads to those you quoted of 9¢ for the white and 13¢ for the yellow nor can we accept the return of same due to circumstances outlined to you previously.

We are willing to stand a personal financial loss here in order to satisfy you in this transaction. Therefore, we suggest the following:

We will adjust the price of the yellow pads only to 20¢ each and keep our 10% credit remaining in effect. Therefore the price of the white pads will remain 18¢ each less the 10%, and the price of the yellow pads will now be 20¢ each less the 10% for a net of approximately 18¢ each.

If this meets with your approval please advise and we will revise our records and yours to reflect the above adjustment.

Thank you for your understanding of the situation and your cooperation.

Sincerely,

PIONEER CREDIT CO.
/s/ H. Pine
H. Pine" (CX 362)

"May 8, 1963

Pioneer Credit Company
30-15 35th Avenue
Long Island City 6, New York
Attention: Mr. H. Pine

RE: Our Purchase Order #38013 to Enzo diMola and Teddy

Dear Mr. Pine:

We have your letter of May 2, 1963. While we feel that we were victimized by the vendor in this transaction, we will pay for the items if you will send us a new invoice as detailed below. Please mark the bill as a correction of your invoice #002789, dated April 3, 1963, in the amount of $1,028.70.

500 boxes Swingline Standard Staples (5M per box)	$265.50
1440 pads, White with blue line 8½ x 11 at 18¢ per pad - 10% $259.20 - 25.92	233.28
1440 pads, Yellow with blue line 8½ x 11 at 20¢ per pad - 10% $288.00 - $28.80=	259.20
	$757.98

If it is of any interest to you, we shall discuss this matter at the next meeting of our Purchasing Agents Association, with the hope of preventing such misrepresentation in our business community in the future.

Very truly yours,

E. M. Russell
Assistant Cashier and
Purchasing Agent" (CX 363)

Respondent Pinkwater, testifying in connection with the defense, said he knew Teddy and DeMola; that they were jobbers for Star for about a year, selling under Pioneer Supply; that they brought in a number of bad orders; there were some complaints; and he discontinued doing business with them two or three years ago (Tr. 1286-87).

Part of the documents relating to transactions between York Supply Company and Cable Electric Products which were received in evidence (CX 374-390) and are self-explanatory, are as follows:

"August 6, 1965

Mr. Henry Pine
York Supply Company
34-50 31st Street
Long Island City 6, New York

Dear Sir:

I have recently received three cartons of merchandise from your company for which we had no purchase order. In reviewing these cartons, I find that they consisted of two cartons of #555/250 carbon paper and one carton marked All Star 144 dozen ball point pens.

If you will recall our telephone conversation, I was very specific in telling you we could not use ball point pens, and that I still had a considerable supply of carbon paper.

I feel very much that I am being placed in a position of accepting merchandise from you which I do not want and in many cases I find is inferior to what we have been receiving. I fully realize that the unit cost which was given to me is less than what we have been paying from other suppliers but, I was assured that the quality of all these products was comparable to what we had been receiving in the past.

Under separate cover, I am returning the above mentioned three cartons and do not feel that I want to continue doing business with you. The past misunderstandings have caused us considerable money in freight charges as well as telephone conversations and have resulted in dissatisfied users of various types of supplies. The above mentioned merchandise is being shipped to you by St. Johnsbury Express collect.

Very truly yours,

CABLE ELECTRIC PRODUCTS, INC.
Arthur S. Rochon
Controller" (CX 383)

"August 11, 1965

Cable Electric Company 234 Daboll Street
Providence, Rhode Island
Att: Mr. Arthur C. Rochon-Controller

Dear Sir:

We are writing to you relative to the merchandise sent you on July 16th, namely the carbon paper and pens.

We wish to thank you for taking a moment to review this shipment with our representative the other day, and to confirm the agreement arrived at. As we have stated, this carbon paper is of the finest quality and we hereby guarantee it; for we know it will retain its many excellent qualities for an indefinite period of time.

However, should you find that this carbon does not live up to its expectations, we agree to accept the return of this merchandise. We do know though, from past experience, that you will be completely satisfied with its performance. And, in a spirit of cooperation, we are willing to extend to you liberal payment terms permitting you to pay for this merchandise as it is used.

Thank you very much for your assistance in retaining this shipment intact.

Very truly yours,

YORK SUPPLY COMPANY
(signed) L. J. Witte

P.S. This merchandise was returned yesterday, from St. Johnsbury and we did not accept same. We would appreciate your contacting St. Johnsbury under pro. 21-164342, and advising them to redeliver this goods back to you. Thank you" (CX 384).

"August 12, 1965

York Supply Company
34-50 31st Street
Long Island City 6, New York

Attention: Dr. Berkowitz

Gentlemen:

This is to confirm our telephone conversation with your Dr. Berkowitz of August 10, wherin [sic] he stated that I would receive a registered letter stating that he had refused shipment consisting of two cartons of carbon paper and one carton of ball point pens shipped to your firm via St. Johnsbury on August 6.

According to Dr. Berkowitz, you no longer had the facilities to hold this paper and because of this, he was willing to extend a billing date of as long as three years or whenever we would have use for this paper. He was also willing to have us accept the ball point pens on a no charge basis.

As I have mentioned on several occasions over the telephone to both Dr. Berkowitz and Mr. Henry Pine that we now have a supply of carbon paper and pens of one to two years. It seems quite ridiculous for us to accept this last shipment. I am notifying St. Johnsbury by copy of this letter to reforwarded this shipment to you and I can only suggest that you find appropriate storage facilities locally.

Very truly yours,

CABLE ELECTRIC PRODUCTS, INC.
Arthur S. Rochon
Controller" (CX 385)

Respondent Pinkwater did not testify with reference to the foregoing.

CX 344 is a written order dated 11/4/63 of the King's Department Store, Inc., Newton, Massachusetts, to Office Systems, Inc., which included an order for "36 Pencil Carbon 2.00 box; 12 Type Carbon 3.00 box". An invoice of Office Systems, Inc., 30-15 35th Avenue, Long Island City, N. Y., to King's includes (CX 346): "36 bx 500/250 sh per bx pencil carbon C 2.00—$180.00; 36 bx 555/250 sh per bx carbon paper C 3.00—$270.00". It is apparent from the foregoing that King's had the impression that each box of carbon paper contained 100 sheets instead of the 250 sheets per box as shipped. The order was further padded by sending 36 boxes of typewriter carbon instead of the 12 ordered.

Sheldon Auratin of the Hermetite Corporation, Avon, Mass., testified (Tr. 997-1045) with reference to a purchase of office supplies from Office Systems, Inc., during November 1963, which, however, will not be discussed because of the refusal of complaint counsel to turn over to respondents a "Jencks statement" with reference thereto. However, Mr. Auratin testified to a subsequent transaction, covered by a separate "Jencks statement", which was submitted by complaint counsel to respondents for use in cross-examination. In 1968, the witness placed an order and received a shipment from Central Stationery Co., 437 W. 218th Street, New York, N. Y. (Tr. 1015; CX 546-548). The shipment was received by Hermetite on January 11, 1968 (CX 546). The witness was contacted by someone in New York claiming to be a doctor. "He stated that a patient of his was in serious financial trouble. Her husband had passed away, and he would appreciate it if [the witness] would help him since he knew Mr. Mangiacotti, who was a vice president of the company at that time . . ." The witness agreed to place a small order on a consignment basis. When the witness "received an invoice without any prior conversation again with this gentleman and based upon previous experience [the witness], just sent back the merchandise intact without paying for it" (Tr. 1021; CX 549). The witness also received a letter from Central, signed by R. D. Shanon, requesting payment (CX 550).

Respondent Pinkwater had no comment to make about Mr. Auratin's testimony.

Respondent Henry Pinkwater, President and Owner of Star Office Supply Company, was called as a witness by complaint counsel at the hearings beginning in New York City on May 6, 1968, and the testimony adduced from him is in itself substantially sufficient to sustain the charges alleged in the Complaint.

Pinkwater testified that when he became associated with Star in 1955 they were located on 28th Street in New York City; about 1956 they moved to Long Island City with the addresses 30-15 35th Avenue and 30-15 31st Street, both addresses were the same structure; that their present address of 5106 Broadway, New York, N. Y., is in the same building, having another address of 437 West 218th Street. He gave it the name Stationer's Exchange Building (Tr. 52-59).

The witness continued:

> "There are certain jobbers that have their own names, they incorporated their own names, and these people I more or less trust because they are honest people, and I let them have their own trade name, but most of the trade names I have myself registered because I want to have the checks coming to me. I don't trust these people that much" (Tr. 74-75).

A typical transaction would be that an order would come in, made out by the jobber, calling for merchandise. It would be shipped by Star on a billhead of the trade name that he was using, like Wald or York, and the purchaser would receive a bill in that trading name. The purchaser would be billed at the prices set by the jobber (Tr. 97). A shipping slip would accompany each shipment setting forth the quantities that were in the package, but the prices thereof were not set forth.

> "When I used to get an order from Javer or from other people, we used to try to send out a special delivery—especially when they went once to Puerto Rico, we sent out special delivery letters saying that we have today received an order, for which we thank them, and we are going to ship out in five or eight

or ten days this-and-this amount of merchandise at this-and-this price; if everything is all right, we will appreciate to confirm it, and if not, let us know if there are any discrepancies" (Tr. 100).

"Q. In other words, by using the verification procedure, you determined that the person didn't really want as much as the jobber had indicated? A. Yes. But these were the unreliable people, and thanks to the Lord, they are not working for me or buying from me any more. These people can put anybody out of business. These are the unreliable people" (Tr. 101).

"Q. I take it, then, you don't verify any orders now? A. Not any more, no" (Tr. 104).

With reference to carbon paper, Pinkwater said:

> "A. By the good jobbers, it was written out, one box, a dozen boxes, the number, the weight of the carbon paper——
>
> "Q. Would that frequently be shown as '555'? A. 555 was five-pound weight, 888 was eight-pound weight, and 250 was 250 sheets, and a hundred would be a hundred sheets. If a box of 250 sheets is seven dollars or eight dollars, this is shown. Sometimes it used to be twelve boxes of carbon paper, 555/250, three dollars per hundred sheets, or written 'Per C.'
>
> "And many of the customers—well, not many of them—but some of the customers, and by some of these people not any longer with Star, would put down and not explain there were 250 sheets per box and bill per hundred, like three dollars per C. That was one of the complaints I got from these people.
>
> "Q. Did you ever require that it be spelled out in the purchase order, 250 sheets per box? A. Yes" (Tr. 107).

> "Q. And the same would be true of the carbon paper? When people would receive a larger quantity than they understood and complained to you and found out the merchandise was on the way—— A. We would try to tell them to keep it, yes, and pay for it later, yes" (Tr. 108-109)

Pioneer Credit Company is a registered trade name used by Pinkwater. Pioneer Credit Company advises the customer that the account has been assigned to it for collection. Pioneer Credit Company letters are usually signed by Miss Wittenstein, using the name "Witte" (Tr. 114). And Friedman sometimes signs such letters, using the name Mr. "Fried"; and sometimes Mr. Pinkwater signs as Mr. "Pine". Robert Shanon uses his own name. Although the account is supposed to be assigned to Pioneer Credit Company, no separate books are kept for Pioneer Credit. There is no "internal switching" from one company to another (Tr. 116). Pinkwater received complaints from people who tried to cancel even before they received the merchandise. It had nothing to do with the merchandise but with statements made by the salesmen; for example, dropping the name of some other executive. Over the years Pinkwater received quite a few complaints about different jobbers. Getting orders they used the sympathy approach, such as a death in the family. Pinkwater tried to get some of these jobbers to discontinue certain types of "door-openers" (Tr. 125).

Despite the complaints, Pinkwater continued to advance some money to so-called jobbers to get new business, in the hopes that he, Pinkwater, could recoup some of the money owed him by the jobbers. So he slowly got rid of them one at a time (Tr. 126-27). Some of the customers' complaints were that the jobbers claimed they were going to work for the United Nations or Radio Free Europe or that sort of thing. Pinkwater did not know of any jobber who went to work for Radio Free Europe, the United Nations, or any international agency. A Star jobber could not honestly tell his customers that the merchandise was being liquidated because of a death in the family (Tr. 128) or because he was liquidating an estate. Jobbers never received title to the merchandise (Tr. 130). Accounts receivable belonged to Pinkwater. The jobber was charged with the merchandise as soon as it went out. When the check came in from the customer, the jobber was given credit on the merchandise. His percent was the difference between the amount charged the customer and the amount charged the jobber by Star for the merchandise involved in the shipment.

> "Q. Let us say you took out a certificate to do business under the name of York Office Supply and Jobber A comes in and you tell him to use the York name and you will bill with the York billing for those customers. Jobber A. has come to you willing to sell stationery and you decide what name he should use; is that correct? A. Yes" (Tr. 134).

Pinkwater explained the procedure employed in collecting delinquent accounts:

> "A. No. After forty-five days we send them a statement, the company that is billing them. After that we would send them a letter three weeks after the statement saying that we would appreciate very much that they would comment or pay.
>
> "If we don't get an answer, we send a stronger letter saying the accounts receivable show that they owe us for the last four months in this account and we would appreciate very much if we would get their idea why they are not paying.

> "Sometimes they didn't order the merchandise or didn't want it. So we would say, please be so kind to look it over and see if you can use it. We will give you a discount if you keep it; if not, send it back to us.
>
> "Sometimes they don't answer this letter, and so then we send an either/or letter, we sue or they pay. If there is no response to that, we send a Pioneer Credit Company letter: 'If you don't pay us, we are going to sue you,' and if we don't get an answer we sue them.
>
> "Q. What is the psychology behind using a Pioneer Credit Company letter? A. Well, the finance, that maybe they will be reported to Dun and Bradstreet. People don't like to get letters from finance companies saying they owe them money.
>
> "Q. Has it proved to be worthwhile in a significant number of instances to utilize that approach? A. At least we get an answer from the man. Maybe he doesn't want the merchandise, and we take it back, but give us the decency of answering a letter. Many times it happened that they were bankrupt and there was no answer to be gotten" (Tr. 139-40).

Advances would be made to jobbers based upon the orders that they brought in, on the basis of 65-70 percent of the expected profit (Tr. 144). Pinkwater estimated that his gross sales in 1967 were approximately $2½ million (Tr. 150). In 1966, his gross sales were offset by sales returns of approximately 25-30 percent and in 1967 between 15-20 percent (Tr. 151). Jobbers are required to write out for carbon paper "250 sheets per box". They can no longer just describe it on an order form as 555/250 (Tr. 151-52). Lindy pens (Tr. 156) cost more that Star pens. A lot of customers understood they were getting Lindy pens and got Star pens instead.

Not all of the jobbers have their headquarters at Star. Some operate from their apartments, some from offices. Pinkwater has permitted Dunbarton International, operated by Charles Kent Arden, who has a downtown office on 45th Street, New York City, to use Stationery Wholesalers—the name is registered under Pinkwater's name (Tr. 328). He described the Dunbarton business as a telephone operation business being conducted by phone rather than by traveling salesmen. Pinkwater does not get all of the business from Dunbarton and does not know the percentage. He has been getting part of the Dunbarton business for five or six months. There were a few complaints on Stationery Wholesalers. He spoke to Charles Kent Arden, but he continued his business with that firm because he finds it profitable. When asked if he felt any sense of responsibility for the methods utilized in the telephone solicitation used by the Dunbarton people, he answered, "The method? Why should I?" (Tr. 333). He added further:

> "I don't feel responsible for how they sell it. I feel responsible for filling the orders that he gives me. I have no responsibility. If my sister would go out and do something, I wouldn't be standing in Court; my sister would" (Tr. 336).

> "Q. Do you recall when you tried to get the jobbers to mark very clearly on the orders '250 sheets per box'? A. Yes.
>
> "Q. Instead of showing 555/250? Do you recall that? A. Yes.
>
> "Q. And do you recall that some of the jobbers objected to your change? A. Yes.
>
> "Q. Why did they object to the change? What did they tell you, that is? A. They objected—some of the jobbers objected to the thing because they used to say that the customer, when he used to get

> 250 sheets per box, they used to show him the box. It was stated on the box 250 sheets per box. But if they used to bring the attention of the purchaser that this was 250 sheets per box, they used to give him an additional warning, like.
>
> "They said it was psychological. The man, all of a sudden, when he saw he was buying, he knew that he was buying 250 sheets per box. But when they told him specifically he was buying 250 sheets per box, he used to start counting and say, 'Well, maybe it is too much; I will take less.' They said it cost them in sales" (Tr. 354-55).
>
> "Q. Getting back to the question, objections by these several jobbers to you, the reason that they didn't want to write it out was that their customers would then know that each box would contain 250 sheets and they were ordering a certain number of boxes, and they didn't want the customer to know that each of the boxes they ordered contained 250 sheets? A. Not all the time" (Tr. 359). * * *
>
> "Q. Not all the time, but some of the time did they not complain about it? A. Yes" (Tr. 359).

In connection with the defense put in by the respondents, Pinkwater testified that sales were made all over the United States and all shipments are made from New York (Tr. 1222). Sales are generally made to business firms. Ninety-eight percent of Star's business is through jobbers. About two percent are sales made by Pinkwater to old customers that he has had for 15-20 years. He gets reorders from them (Tr. 1227).

Jobbers are not employees of Star. They are independent and self-employed (Tr. 1228). Star does not withhold Social Security, Federal or state taxes, nor does it pay workmen's compensation insurance for them and carries no unemployment insurance for them. It does not direct jobbers as to where they should sell nor are they required to order exclusively from Star. They can sell for other companies. It does not give any customer leads to sell to. Star does not fix the price at which jobbers have to sell the merchandise. Pinkwater only fixes the price he sells to them. Between 21-28 jobbers are currently buying from Star (Tr. 1230). Over the past five years they have had about 60 jobbers. Some of the jobbers have office space in the same building as Star. About ten or 11 of the jobbers use office space on Star's premises. They have their own telephones. They also use the Star telephone (Tr. 1231). Long-distance calls made on Star's telephones are charged to the jobber. Jobbers that do not use the space in Star's building operate from their homes or their own offices. Some of the jobbers employ other people. Pinkwater does not know how many they employ.

> "Q. Are all of the names that these jobbers use that you have control over registered with the County Clerk? A. Yes, definitely. The bank insisted on that.
>
> "Q. Do certain of the jobbers sell under names that you don't have control over? A. There's a couple.
>
> "Q. In these cases, do you receive the money from the sales? A. Yes" (Tr. 1236).

There are a few jobbers, Pinkwater didn't know how many, that were not using names that he had registered (Tr. 1245).

With respect to Paragraph Five, subdivision (a) of the Complaint, Pinkwater said he did not direct any jobber to do what is alleged in that paragraph (Tr. 1248). Once in a while he would receive complaints that such practices were done. When he received such a complaint he approached the particular jobber. Only one jobber ever admitted that he was doing such a thing as is alleged in Five (a), and Pinkwater immediately quit selling to him. With respect to Paragraph Five (b) of the Complaint, Pinkwater stated he never directed any jobber to make such an allegation but he received a few complaints regarding such claims. He spoke to the jobbers; they all denied it emphatically. When questioned with reference to Paragraph Five (c) of the Complaint, Pinkwater testified that he did not direct any jobbers to sell merchandise by using that particular method. When asked if he had received complaints at Star about such practices, he responded:

> "My bank once called me up and said, 'What is going on? You are liquidating your business?' I told him, 'My God, what is happening?' So this was the kind of complaints that I had and they were only detrimental to me. It was terrible" (Tr. 1251).

He stated when he received such a complaint he approached the jobber involved and told him to stop it. And he said that no jobber ever said he sold by claiming he was liquidating the merchandise.

With respect to Paragraph Five (d) of the Complaint, Pinkwater testified that he had never directed any jobber to conduct business by using this method, but that the company had received complaints about this particular practice. Pinkwater testified that no jobber ever would tell him that he had padded a particular order.

> "Q. If complaints continued, what steps did you take? A. I tried to prevent them. I tried to straighten out with the customers. We took back merchandise. We were actually the losers because to get back from the jobbers some of the commissions was impossible. That's why I have submitted here some of the statements how much they took me for.

> "Q. If after speaking with them several times this complaint continued, what step did you take then? A. I stopped shipping merchandise for them" (Tr. 1253-54).

With respect to Paragraph Six, subsection (a), of the Complaint, Pinkwater testified that the allegation was not true; that they substituted nothing without the customer's consent; that they shipped exactly what the order called for. He stated that most of the standard size of pads are 40 sheets per pad, 50 is the most popular over the whole country—50 or 100 sheets. He testified that the order would denote the type of the pad. He indicated that the shipping order would definitely set down 50 or 100 sheets and this was the order received from the jobber. However, when questioned by the Hearing Examiner, he admitted that the orders did not show specifically that it consisted of 50 sheets per pad (Tr. 1258-59). Pinkwater said that if it was for 100 sheets per pad, the order would be for "yellow canary sheet pads, 100 per pad" (Tr. 1259). "That would be a special order . . . because most of the time we shipped 50 sheets per pad" (Tr. 1259). If the order didn't say anything then it was understood that it would be 50 sheets pen pad. Over the past five years there were a large number of complaints against certain jobbers and he named some of them (Tr. 1263-64).

There came a time when Pinkwater sent a memorandum to all of his jobbers; and he identified RX 33 which was the memorandum to all jobbers dated October 2, 1967.

"MEMO TO ALL JOBBERS AND REPRESENTATIVES:

"It has come to our attention that certain representations and statements are being made to perspective customers and present customers which are not being made in an ethical business manner.

"Because of this unethical manner of doing business, sound orders have been cancelled and you have incurred a great deal of extra expense by freight costs and lost revenue.

"The above mentioned representations are not limited to, but include, for example:

> "A-Statements that a Jobber or Representative is departing for the Armed Service or returning to a foreign country.
>
> "B-Statements that a relative of the Jobber or Representative, who owned an Office Supply Co. has recently died, and the Jobber or Representative is liquidating his operation.
>
> "C-Representations that lead the customer to believe that he is receiving a much smaller quantity of merchandise than the Jobber or Representative intends to have shipped (in other words—overshipment. Specifically the customer should be told relative to carbon paper, the exact amount of sheets in a box, that the sheets of paper are 100 sheets or 250 sheets per box. Also, on other items the customer should be clearly given to understand how many particular pens or any other items are in a box or unit, and exactly what the box or unit consists of).

"It goes without saying that the above referred to practices must not be permitted to exist as these practices are only detrimental to sound business operations, and in the long run it costs you money because of the returns of orders, which otherwise could have resulted in a profit and not a loss."

"STAR OFFICE SUPPLY CO., INC.
"Henry Pinkwater, President
/s/ Henry Pinkwater" (RX 33)

Daniel L. Friedman was subpoenaed as a witness by complaint counsel. He testified that he was employed by Star from October 1963 to November 1967 as Comptroller. He was in charge of the accounting side of the business in contrast to the selling end (Tr. 166). He was familiar with possible return of merchandise but not with respect to the direct complaint itself; that he had seen letters where the basic complaint was the possible shipping of more merchandise than the customer alleged was ordered. He testified that with respect to the customers who were slow in paying their bills or acknowledging their letters, he would write a communication on the letterhead of Pioneer Credit Company on the instructions of Respondent Pinkwater (Tr. 175). He remembered that there was a time when returns of merchandise from customers ran in the neighborhood of at least 30 percent (Tr. 176); that Mrs. Witte also sent out letters on Pioneer Credit Company letterhead; that Mrs. Witte handled the matters that arose on customers' complaints through Mr. Pinkwater.

Friedman testified that he was not an employee of the Pioneer Credit Company; that he was paid exclusively by Star; and that he signed Pioneer Credit letters with "L. Daniels" and "Fried" (Tr. 180-82). The witness testified that with certain jobbers, 40 out 100 of the orders that they take in the company would have problems with (Tr. 189).

> "Well, if John Jones, a customer, wrote in saying he had received too much merchandise, we would try to encourage Mr. Jones to keep the merchandise by offering him a discount, . . ." (Tr. 194).

Friedman had seen letters of complaint from customers indicating that they wanted to cancel because the jobber used the name of another person with the firm improperly and because jobbers had used a distress or sympathy appeal in trying to get a sale (Tr. 197-98).

Friedman testified that gifts are a frequent occurrence in sales (Tr. 249); that a jobber would have a gift sent to a particular customer as an inducement to buy and that the gift would be charged to the jobbers. These gifts were supplied by Star to the customer and charged to the jobber (Tr. 250).

On cross-examination Friedman testified that the jobbers were not employees of Star; that they were not paid salaries; and that they were not on the books as employees of Star. Star did not withhold any taxes, did not pay workmen's compensation, or disability insurance (Tr. 255).

There was received in evidence contracts by, and between, Star Office (sometimes referred to as "Company") and certain persons (sometimes referred to as "Jobber") executed sometime in the year 1964, relating to the selling of the Company's products by the Jobber (CX 12 through 23). The "Third" clause of each contract reads, in part:

> "The Jobber shall continue to conduct his business as an independent contractor only, and in such manner that no claim against the Company may arise, and that no liability shall be imposed upon the Company by reason of any acts of the Jobber, his agents, servants or employees" (CX 12-B).

The "Fourth" clause reads:

> "The Jobber shall not use the Company's name nor the name of any of the subsidiaries, subdivisions or affiliates of the Company, nor any of their trade-marks or registrations in connection with the Jobber's name or his firm name, except as may be authorized by Company" (CX 12-B).

The "Fifth" clause reads, in part:

> "All sales solicited by the Jobber for the Company's products, if accepted by the Company as hereinafter provided, shall be on order forms approved by the Company and shall be in the Company's name. * * * All bills and invoices shall be by the Company and in the Company name. The invoices and accounts receivable represented thereby shall be the property of and belong to the Company. Title to merchandise sold by the Company through the Jobber shall remain with the Company" (CX 12-C).

The respondents, in their pre-trial brief, describe their theory of the case as follows:

> "Respondents do not wish to contest the findings of the Commission with respect to the acts and practices alleged to have been engaged in by the so-called 'jobbers' mentioned in its complaint. Respondents' position is that respondents cannot be held liable for the acts and practices of any jobbers to whom they supply merchandise by reason of the fact that all jobbers supplied by respondents are independent contractors. Said independent contractors are not obliged to sell only the merchandise supplied by respondents. They may buy merchandise from whomever they please and sell to whomever and

wherever they please. They cannot be classified as respondents' salesmen and are under no exclusive supplier arrangement with respondents.

"Respondents do not contest the fact that they accommodate certain jobbers with office space and telephone and other office services. Such accommodations are made only at the request of the jobbers and those jobbers are charged for such office space and any and all office expenses which they incur.

"Respondents further admit that in certain instances, they supply trade names to jobbers. They will show, however, that this is done only as a means of limiting credit losses to respondents where jobbers are unable to pay for their purchases before reselling them. The trade names supplied are not for the purpose of clothing jobbers with such trade names.

"Respondents will show that they have often suffered losses where the practices of certain jobbers have been questioned by customers; and that therefore it has been in their own best interests for respondents to police the practices of their jobbers and they have done so. Respondents will show further that in all instances where any suspicion of unfair practices on the part of any jobber has come to their attention, they have warned such jobbers to cease and desist from such practices. Where such warnings were not heeded, respondents have discontinued supplying such jobbers.

"It is the respondents' position, therefore, that not only can they not be held responsible for the acts and practices of independent contractors whom they supply, but that respondents have extended themselves to the utmost in attempting to eliminate any unfair practices on the part of such independent contractors. For the Commission to attempt to hold

> respondents absolutely liable for any act by any person handling respondents' merchandise in the chain between the supplier and the consumer would place an undue burden upon the respondents."

The situation here could be described by what is said in *Goodman* v. *Federal Trade Commission*, 244 F.2d 584, pp. 590-591 (9th Cir. 1957):

> "The Status of the Salesmen.
>
> "The petitioner's primary contention is that the salesmen who sold the course were *independent contractors*, for whose actions he was not responsible. The brunt of the argument is based on the claim that because the petitioner carried the salesmen on his books as independent contractors, his agreement with them so stated, and he had no control over their work and the manner of performing it, the connection between him and his salesmen conformed to the classical characteristics which courts have attached to that relationship.
>
> "The criteria of direction and control, which govern in determining whether or not such relationship exists, are well recognized in law. However, even the general criteria are not applied with rigid consistency. And in the authorities [footnote omitted] there are references to cases in which salesmen have been held to be agents of the principal notwithstanding assertions of a different relationship. However, when interpreting a statute the aim of which is to regulate interstate commerce and to control and outroot some evil practices in it, the courts are not concerned with the refinements of common-law definitions, when they endeavor to ascertain the power of the business activity or the enforcement of standards it has established."

• • • • •

"The statute under which the present proceeding was instituted declares unlawful,

> 'Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce.' [Footnote omitted.]

"And the Commission is empowered to prevent persons

> 'from using unfair methods of competition in commerce and deceptive acts ~~or~~ practices in commerce.' [Footnote omitted.]

"The courts in interpreting the particular statute have stressed the fact that one who

> 'places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act.' [Footnote omitted.]

"So when they found that there were unfair or deceptive acts in conjunction with the sale or advertising of a product or service in commerce, they held the seller or manufacturer responsible whether the salespersons were what might have been considered at common law independent contractors or not. All they were interested in was to determine whether misrepresentations were made within the *apparent scope* of the authority of the salespersons."

The Order

It Is Ordered that respondents Star Office Supply Co., a corporation, and its officers, and Henry Pinkwater as an officer of said corporation, as an individual trading and doing business as Pioneer Credit Co., and as an individual or in conjunction with others doing business as Century Supply Co., Central Stationery Co., Dorex Office Supply Co., Kent Supply Company, Normandy Office Supply Co., Office Systems, Oxford Systems, Pioneer Supply Company, Wald Office Supply Co., York Supply Company or under any trade name or names, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of stationery, office supplies or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that they have been recommended by persons or officials in the prospective purchasers' firm or of any of its branches, or of its affiliated, or associated firms; or that they have a personal or other relationship with any such person or official, or representing by any method or means that they have the endorsement or approval of any person or official.
2. Representing, directly or by implication, that they have past or prospective association with organizations or branches of the United States Departments of State or Defense, the United Nations, Radio Free Europe, or with patriotic or public service organizations or any other organization or agency.
3. Representing, directly or by implication, that they are liquidating stocks of such products, or are engaged in the sale or distribution of distress merchandise.

4. Furnishing to others engaged in the sale of merchandise distributed by any respondent, the means, instrumentalities, services or facilities by or through which they may make any of the representations prohibited by parts 1 to 3 hereof.

5. Participating with others engaged in the sale of merchandise distributed by any respondent in making any of the representations prohibited by parts 1 to 3 hereof.

6. Padding, increasing or overstating the quantity of merchandise ordered, through the use of confusing or misleading nomenclature or descriptions to denote quantity, or through any other method or means; or failing accurately and precisely to record on order blanks or any other documents purporting to state an order for such products, the kind, quantity, quality and price of goods ordered.

7. Failing to furnish to purchasers, prior to shipment of such products, a written statement setting forth clearly and conspicuously, a full and accurate description of the quantity and the unit and total prices for each ordered item to be shipped and, where such have been the subject of representations or specifications in connection with the purchase order, the brand name, type, size or quality of the items ordered.

8. Substituting merchandise items, shipping in greater quantities or billing at higher prices than as set forth in the statement furnished the purchaser prior to shipment, except upon the express authorization of such purchaser.

9. Thwarting, refusing to accept, or preventing by any method or means, cancellation of all or part of any

order for merchandise; provided, however, that it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that any such transaction did not involve an act or practice prohibited by other parts of this order.

10. Representing, directly or by implication, by any method or means that an account has been assigned to third parties or holders in due course for collection; provided, however, that it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that the said account was in fact assigned to, and that any demand or representation in connection therewith was made by, a bona fide third party.

/s/ WALTER R. JOHNSON
Walter R. Johnson
Hearing Examiner

April 11, 1969

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 35,066

STAR OFFICE SUPPLY COMPANY ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

JUDGMENT

Star Office Supply Company and Henry Pinkwater having filed their petition to review an order issued by the Federal Trade Commission on April 16, 1970, in Docket No. 8749; and the matter having been heard by this Court on briefs and oral argument on September 14, 1971; and the Court having announced its decision that the Commission's order should be affirmed and enforced, it is now therefore

ORDERED, ADJUDGED, and DECREED that the order be, and it hereby is, affirmed and enforced.

By the Court.

IRVING R. KAUFMAN
WILFRED FEINBERG

Filed: Sep. 28, 1971